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COMPETITION LAW & MEDIA PLURALISM IN THE EU AND FINLAND

The Current Legal Framework and Possibilities for Future Policy

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IBL-800 – Master's Thesis
20 April 2021

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Tiivistelmä

Tiedekunta: Oikeustieteellinen tiedekunta

Koulutusohjelma: Master of International and Comparative Law

Opintosuunta: Business Law

Tekijä: Vanessa Hotta

Työn nimi: Competition Law and Media Pluralism in the European Union and Finland: The Current Legal Framework and Possibilities for Future Policy

Työn laji: Maisterintutkielma

Kuukausi ja vuosi: Huhtikuu 2021

Sivumäärä: II-XVI + 66

Avainsanat: Kilpailuoikeus, median monimuotoisuus, Euroopan unioni (EU)

Ohjaaja tai ohjaajat: Professori Ville Pönkä

Säilytyspaikka: Helsingin yliopiston kirjasto

Tiivistelmä:

Ilmiö joukkoviestintämarkkinoiden keskittymisestä ja uusien teknologien aiheuttamista muutoksista media-alalle on maailmanlaajuinen; osa mediataloista on lakkauttanut toimintansa kokonaan, kun taas osa yrityksistä on myyty suuremmille kilpailijoille tai muille alan toimijoille. Tämä on johtanut suurien, eri aloilla toimivien monialayritysten syntymiseen ja vähentänyt markkinoilla toimivia yrityksiä. Kehitys on havaittavissa myös Suomessa: esimerkiksi vuonna 2016 päivälehtiä oli 30 vähemmän kuin kymmenen vuotta aikaisemmin. Maaliskuussa 2020 sanomalehtien keskittymiskehitys kulminoitui, kun Sanoma Oyj osti Alma Media Oyj:n paikallislehdet, mikä herätti julkista keskustelua siitä, uhkaako yrityskauppa Suomen median monimuotoisuutta. Kilpailu- ja kuluttajavirasto kuitenkin (KKV) jätti kysymykset median monimuotoisuudesta huomioimatta vedoten kilpailulain asettamien toimivaltarajojen lisäksi Euroopan komission viimeaikaiseen tapauskäytäntöön, jossa kysymyksiä yrityskauppojen vaikutuksista median monimuotoisuudelle pidetään kilpailuoikeuden alaan kuulumattomina.

Tämä opinnäytetyö tutkii Euroopan unionin (EU) kilpailuoikeuden suhdetta median monimuotoisuuteen liittyviin kysymyksiin. Tutkimus osoittaa, että vaikka komission viimeaikainen tapauskäytäntö on keskittynyt yrityskauppojen taloudellisiin vaikutuksiin – antaen painoarvoa erityisesti hintakilpailulle – komissio on aikaisemmin antanut painoarvoa myös median monimuotoisuutta käsitteleville seikoille. Koska EU:lla ei ole toimivaltaa antaa kulttuurialaan liittyviä säännöksiä, on ensisijainen vastuu median monimuotoisuuden suojelusta kuitenkin jäsenvaltioilla. Kun huomioon otetaan kilpailusääntöjen joustavuus ja monimuotoisen median merkitys demokratialle, joka on yksi EU:n perusarvoista, tukee teleologinen laintulkinta kuitenkin myös median monimuotoisuusnäkökulmien huomioonottamista myös kilpailuanalyysissä. Lisäksi EU:n kilpailusäännöissä huomioidaan hinnan olevan vain yksi kilpailuparametreistä mm. tuotteen laadun ohella. Tämä puolestaan mahdollistaisi sen arvioimisen, heikentääkö yrityskauppa mediamarkkinoilla olevien tuotteiden laatua.

Opinnäytetyö ottaa myös kantaa laajempaan keskusteluun siitä, tulisiko niin kutsuttuun yleiseen etuun (public interest) liittyviä kysymyksiä käsitellä kilpailuoikeudellisessa analyysissä. Keskeinen argumentti on, että vaikka nykyinen, vahvasti hintakilpailuun perustuva analyysi ei palvele kuluttajia parhaalla mahdollisella tavalla, ei kilpailuoikeutta ole tarkoituksenmukaista käyttää ensisijaisena keinona median monimuotoisuuden suojelussa. Kilpailuoikeuden vallalla olevia menetelmiä ja käytäntöjä olisi kuitenkin suotavaa uudistaa siten, että ne ottavat jokaisen markkinan erityispiirteet huomioon. Media-alalla tämä tarkoittaa esimerkiksi sen huomioimista, ettei hinta ole keskeinen kuluttajaa ohjaava tekijä. Tämä tukisi mahdollisesti myös median monimuotoisuuden säilymistä ja palvelisi kuluttajien hyvinvointia nykyistä staattista analyysiä paremmin. Media-ala tarvitsee

kuitenkin säilyäkseen tuekseen myös erityislainsäädäntöä, mikä on kilpailuoikeutta tarkoituksenmukaisempi keino vastata median monimuotoisuutta koskeviin uhkiin, vaikka kilpailuoikeutta voidaan käyttää erityislainsäädännön tukena.

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LIST OF ABBREVIATIONS

ACCC	The Australian Competition and Consumer Commission
CC	The Commerce Commission New Zealand
CDP	Cross domestic product
CFR	the Charter of the Fundamental Rights of the European Union
CMA	Competition and Markets Authority
DG Comp	Directorate-General for Competition
DNR	Reuters Institute Digital News Report
EAO	European Audiovisual Observatory
EBU	European Broadcasting Union
EC	European Commission
ECHR	European Convention on Human Rights
EU	the European Union
FCC	US Federal Communications Commission
FCCA	the Finnish Competition and Consumer Authority
HLG	the EU High Level Group on Media Freedom and Pluralism
ICN	the International Competition Network
IP	Intellectual property
KEK	Kommission zur Ermittlung der Konzentration im Medienbereich (eng. Commission on Concentration in the Media)
MSG	Media Service GmbH
NZ	New Zealand
OECD	Organisation for Economic Co-operation and Development
OFCOM	The Office of Communications
PSM	Public Service Media
PSB	Public Service Broadcaster
SSNIP	Small but significant non-transitory increase in price
SSNDQ	Small but significant non-transitory decrease in quality

US	The United States of America
YLE	Yleisradio Oy

1. Introduction

Media markets are experiencing tremendous social and technological changes. Declining audiences for print newspapers, convergence in media technologies and the proliferation of digital and internet technologies allowing for multiplication of online sources and services have created disruption and uncertainty for media markets. Some media outlets, especially in the print media, have closed down. These changes have also resulted to an international trend toward media mergers and the development of international media conglomerates, in which companies have interests across different media, including print, radio and television, and online media.[1] These developments have resulted in increasing concentration in media markets.[2]

From the traditional economic perspective, there is potential for efficiencies in such mergers and acquisitions, as they can be seen as logical developments in a changing industry landscape.[3] Media commentators, however, have expressed broader concerns about the effects on liberal democracy and citizenship. In addition to executive, legislative and judicial branches of the government, the media is sometimes described as the 'fourth' institution in liberal democracies, as it seen as playing a key role in safeguarding the proper functioning of the democratic institutions.[4] It is axiomatic that democracy requires an environment where not only different versions of the facts can be weighed and tested by citizens, but where differing emphasis and coverage given to those facts and events may be found.[5]

Media plurality, especially, refers to the requirement to have sufficiently many diverse opinions expressed in the public domain in order to maintain a level-playing field in the political sphere.[6] As media is powerful in molding public opinion and by exposing the citizens to diverse viewpoints allowing citizens to make informed voting decisions, it is often assumed

[1] Kingsbury, 2017
[2] Kingbury, 2017
[3] Kingsbury 2017
[4] Emch, 2012; Kingsbury 2017
[5] Vīķe-Freiberga et al., 2013
[6] Emch, 2012; Vīķe-Freiberga et al., 2013

that the accumulation of significant market power in the hands of a few 'may result in a skewed public discourse where certain viewpoints are excluded or under-represented'.[7]

The international trend of media consolidation is evident in Finland too. In 2016, 174 newspaper outlets existed Finland, which is 30 less than ten years ago.[8] Despite the slight increase of newspapers' overall circulation, only a handful of companies have managed to grow their circulation, (e.g. the daily newspaper *Helsingin Sanomat*) an many newspaper outlets have given up auditing their circulation completely.[9] The three biggest newspaper companies, *Sanoma Oyj*, *Alma Media Oyj* and *Keskisuomalainen Oyj* held 45 % of the overall circulation in the Finnish market in 2016.[10]

The consolidation of the Finnish newspaper markets reached a culmination in March 2020 when Finland's biggest media outlet, *Sanoma Oyj*, bought the local and regional newspapers of *Alma Media Oyj*, raising some public discussion over merger's effects on media plurality. This was for a good reason: together, the new merged entity holds roughly 32 % of the overall newspaper circulation in Finland.[11]

In March, the Finnish Competition and Consumer Authority (FCCA) cleared the transaction already in the Phase I -investigation, meaning that the transaction does not raise any serious competition concerns.[12] The FCCA declared in the decision that due to the competence limitations, it cannot take into account plurality considerations: relying on the Commission's decision *Fox/Sky* from 2017, the FCA also noted that the purpose and legal frameworks for competition assessment and plurality assessment are very different.[13]

Given the international trend of media concentration, the question of whether competition law – and merger control in particular - could be utilised as a tool to protect media pluralism has

[7] EC Staff Working document on media pluralism, 16 January 2007, p. 5
[8] Medialiitto 2018:17
[9] Official Statistics of Finland, 2019
[10] Medialiitto, 2018
[11] The estimate of the overall newspaper circulation is based on the data on overall circulation provided by MediaAuditFinland, available in Finnish at https://mediaauditfinland.fi/tilastot/. The overall circulation of all Finnish newspapers was approximately 1,7 million in 2017, whereas the joint circulation of Helsingin Sanomat and Alma Media regional newspapers was approximately 524 000.
[12] The Finnish Competition authority has to approve mergers that are not estimated to cause serious harm to competition within a month in a Phase I-investigation (Kuoppamäki, 2018).
[13] Dnro KKV/34/14.00.10/2020 *Sanoma Oyj/ Alma Media,* note 36.

received a great amount of scholarly attention. This thesis will discuss this existing literature and will try to add on this literature by analysing the relationship between competition law and media pluralism in the Finnish markets. The research question is defined in more detail in the next chapter.

2. Research Question and Methodology

In short, this thesis will aim to answer the following research question:

1) Does the European Union (EU) competition law (and Finnish competition law) have the capacity to safeguard media pluralism in Europe?

The following sub questions is 2) Is it desirable to use competition law as tool to tackle pluralism concerns in the first place, or should other policy instruments be employed (i.e. industry-specific regulation?)? In this instance, this thesis will also take a stance on the current, vivid academic debate on the use of public policy considerations in competition policy analysis and decisions. As noted by Joseph Drexl, the question of whether competition agencies should promote media pluralism is the most relevant in media mergers.[14] Therefore, this thesis will especially examine the role and desirability of including concerns over media plurality in merger review. However, overall, the relationship between competition law in general and media pluralism considerations will be discussed in a broad perspective, and hence this thesis will also touch the EU State aid regulation and regulation on anti-competitive agreements.[15]

Given the variety of research questions, this thesis will use a mixed-method approach to answer these questions. First, this thesis will establish the legal boundaries in which the EU and the Member States can take media pluralism considerations into account when applying competition rules. In this instance, this thesis will also discuss the role of competition law in our society and its current and historical aims.[16] Beyond explaining and systematizing norms, this thesis will also take a *normative approach* by looking for a 'better law'. In this *normative*

[14] Drexl, 2015
[15] Whish and Bailey identify the following five practices to be particularly central to competition law: 1) anti-competitive agreements; 2) abusive behavior by a monopolist or a dominant firm 3) mergers 5) public (i.e. state) restrictions on competition (Whish and Bailey 2012: 2–3)
[16] Hoecke identifies an approach in which legal doctrine is considered as an *explanatory discipline* as one perspective from which legal doctrine has been presented (Hoecke, 2011).

approach, the fundamental question to be answered is which set of norms maximises the long-term happiness of all sentient beings (*the H-standard*).[17] Following this, the method for a normative legal science necessarily requires the research to include methods external to law and legal doctrine, such as methods of sociology, psychology and economics and other social sciences.[18]

As the principal focus of this thesis is competition law - primarily concerned with maintaining competitive market structures - economic perspectives are naturally of outmost importance. More particularly, however, given that the thesis examines the relationship between competition law and media pluralism, the views offered by experts on communications and journalism are particularly important. As a result of the prevailing doctrine of the sources of the law[19], the use of economic arguments and other *actual arguments* is considered subordinate to the statutory law, which is why their role in Finland has been much more limited than elsewhere in the United States or elsewhere in Europe.[20] A point worth highlighting, however, is that as that legal analysis of competition law is essentially based on economic doctrines, the division between legal- and economic arguments is somewhat artificial.[21]

The possible risks regarding the normative approach should not be neglected. The obvious downside of the normative approach is that it risks subjectivity, as personal views and values inherently affects how the researcher interprets and selects the information and facts available. [22] Thus, as Mark van Hoecke has noted, the normative approach can only be scientific if it:

> '[…] looks for an *intersubjective consensus*, for the prevailing opinion among legal scholars or lawyers in general (especially judges and academics who made their views public through judicial decisions or other types of publications. It can be checked empirically as to whether an opinion is (largely) prevailing among those professionals or in society.'[23]

[17] Hage, 2011
[18] Hage, 2011
[19] According to the prevailing doctrine of the sources of the law, sources of the law are divided into three groups according to their binding effect in legal argumentation: *1) Strongly binding* (norms of statutory law and established custom) *2) Weakly binding norms* (legislative drafts and decisions of both the Supreme Court and the Supreme Administrative Court *3) Permitted sources of law* (jurisprudence, general legal principles and actual arguments). The idea is to primarily use the source highest in the hierarchy (Raitio, 2012)
[20] Wikberg, 2011
[21] Wikberg, 2011
[22] van Hoecke, 2011
[23] Van Hoecke 2011:10, emphasis added.

The method prescribed by van Hoecke – trying to find the prevailing opinion among legal scholars and other experts – is precisely what this thesis is aiming to do. As the literature on the relationship between media pluralism and competition law in Finland is rather limited – if non-existing – this thesis will necessarily have to rely on literature from other jurisdictions too.

In this regard it is worth noting that instead of offering absolute moral truths, legal rules and principles are placed in a particular context, which include – but are not limited to – a whole institutional context of practices and other established rules.[24] Following this, the views and opinions would ideally be drawn from societies with roughly similar characteristics[25], such as other Nordic countries. However, as the developments of digitalization and newspaper consolidation are, to a large extent, universal, views from other countries will be included too.

Furthermore, albeit some differences exist, the basic principles and doctrines in competition are roughly identical in all Western countries. As noted by Maher M. Dabbar, a notable trend in competition law literature, practice and understanding has been to view competition law in different parts of the world with the same lenses, irrespective whether this is sensible or not.[26] The literature on media pluralism and competition law is especially comprehensive in the United States (US), which is why views and opinions will be presented too. However, given the differences between the media markets of Finland and the US – the arguably different degrees of politisation of media outlets, the different sizes of the media markets and the different roles of state funded public media services - the recommendations for policy and other conclusions cannot be taken at face value and will necessarily have to be adjusted to the Finnish context. Next, this thesis will briefly explain the theory of perfect competition and discuss the current market conditions of media markets, which set the large context in which competition rules are applied.

[24] Bell, 2011
[25] The characteristics affecting the media markets in Finland are, but are not limited to: relative homogeneity of citizens, small population and limited linguistic group which have an impact, among other things, on the size of the media market.For instance, in 2019 the size of media markets in Finland was only 3.9 billion euros, whereas in Germany it was around 53.3 billion in the same year (Official statistics of Finland, 2020; MarketResearch.com 2021).
[26] Dabbar, 2010

PART I: MARKET CONDITIONS IN MEDIA MARKETS

3. The Theory of Competition

The doctrine that efficient competition – ideally, perfect competition - will maximise the welfare of consumers, has received nearly a common sense status in the literature. [27] It is worth highlighting, however, that the theory of perfect competition is, as the name implies, a theory; the prerequisites for perfect competition are extremely unlikely be observed in the real world.[28] Between the two polar market structures – monopoly on the other hand and perfect competition on the other – there are many intermediate positions in the spectrum.[29]

When a market's characteristics differ *dramatically* from those required for perfect competition, a condition termed 'market failure' can occur, decreasing the overall level of consumer welfare.[30] Although economists generally agree on the fundamental concept of perfect competition, there is no generally agreed list of factors that define perfect competition. A leading scholar of the subject, Edwin Mansfield, argues that perfect competition requires four conditions: 1) product homogeneity 2) relatively small buyers and sellers 3) mobile resources and 4) perfect information.[31] Conversely, Jack Hirshleifer provides a list of three possible that can prevent a market from functioning perfectly: 1) imperfect information 2) time lags and 3) transaction costs.[32] Barriers to the entry of new firms, circumstances of natural monopoly, positive or negative externalities and situations involving 'public goods' or 'free-riding' have also been regarded as threats to perfect competition.[33] Despite disputes over taxonomy, the list of factors that can possible cause suboptimal competition is relatively uncontroversial.[34]

Different research orientations in economics with different social political stances have led to different schools of thought in competition policy. In essence, the differences in policy

[27] Averitt and Lande,1997
[28] Whish and Bailey, 2012
[29] Whish and Bailey, 2012
[30] Averitt and Lande, 1997
[31] Mansfield 1985, cited in Averitt and Lande, 1997: 724
[32] Hirshleifer 1984, cited in Averitt and Lande, 1997: 724-725
[33] Averitt and Lande, 1997
[34] Averitt and Lande, 1997

proposals between the schools result from the differing views on how the markets can correct themselves in the event of a market failure. [35]

4. Does Ownership Matter?

Taking into account the topic of this thesis, it worth addressing whether the ownership of a media house affects the content they produce in the first place, as the view that the concentration of media threatens our democracy has not gone unchallenged. There seems to be two opposing views on this: according to the *deregulatory approach,* media content is a direct result of customer preferences in the market, and hence the ownership of the media house is irrelevant. In contrast, the other approach is more skeptical about the ability of the markets to serve consumers' needs and places more weight on the ability of owners and editors to determine the content and orientation of media products. These two opposing views are worth examining next.

The deregulatory approach: Media products a result of customer preferences in the market

According to the traditional deregulatory approach, the market will adjust to match audience preferences, so ownership of the media is irrelevant to the quality of the content. Therefore, concentration of media is not a policy problem that needs fixing.[36] Benjamin Compaine, an appreciated economist and lead author of the most conclusive book of media ownership in the United States[37] is possibly the most prominent scholarly critic of the view that concentration in the mass media is objectionable.[38] According to Compaine, the media is owned by "thousands of large and small firms and organizations […] controlled, directly and indirectly, by hundreds of thousands of stakeholders, as well by public opinion".[39] Thus, antitrust law provides a desirable surrogate for any important social and political standards, and therefore provides an appropriate measure of concentration.[40] This approach can also be called as the *Chicago school approach,* which is worth a brief elaboration next.

[35] Wikberg, 2011
[36] Stucke and Grunes, 2009; Baker, 2007
[37] Compaine and Gomery (2000) *Who Owns the Media? Competition and Concenration in the mass media industry*
[38] Baker, 2007
[39] Compaine and Comery, 2000: 560-61)
[40] Baker, 2007

According to the *Chicago school approach*, a profit-maximising firm has no power to raise prices without losing customers to competitors in competitive market. However, the theory also recognizes that products compete on both price and nonprice elements, such as content quality, and the same lack of power applies to detrimentally changing non-price qualities.[41] As price declines, content quality declines – embodied in the slogan 'you get what you pay for'.[42] In this setting, the firm tries to find a profit-maximising combination in response to consumer references. Therefore, in a competitive market where there is no monopoly power, the market will establish which combinations of prices and quality create economically viable products.[43]

Market forces inadequate to serve the needs of customers and citizens

As stated earlier, the other approach is more skeptical about the ability of market forces to respond to consumer preferences and estimates the owners and editors of say, newspaper outlets to have the final say in the content of media products. These arguments are worth examining in more detail.

First, as noted by Edwin Baker, the idea of the markets producing products with ideal quality/price balance falters if consumers disagree about whether the changed product is an improvement to the previous one or not. This disagreement cannot be avoided in the media markets with highly heterogenous customer preferences.[44] As noted by Baker, while more money spent on producing generally results in higher quality content, content in media products have a second set qualitative dimensions. Using the same expenditure, a firm can create *differently orientated* content.[45] For instance, a newspaper can report the local event with a leftist slant or with a rightist slant.

While the choice of content orientation can be motivated by the aim to maximise profits, media products are subject to their own particular economic logic, which complicates the application of neoclassical economic theory.[46] At least in theory, in the context of varying

[41] Baker, 2007
[42] Baker, 2007
[43] Baker, 2007
[44] Baker, 2007
[45] Baker, 2007
[46] Baker, 2007

consumer preferences, a change of content orientation could potentially lead to an equivalent gain of new and loss of old customers (or of customers equivalent value to advertisers).[47] Thus, an equilibrium could develop with either content prevailing. Accordingly, even with perfect knowledge about consumer preferences, profit maximization will not *always* dictate a unique choice of content, leaving the choice of content ultimately in the hands of the producer.[48]

There is some empirical evidence pointing towards the other direction, however. According to the empirical study by Matthew Gentzkow and Jesse M. Shapiro, firms respond strongly to consumer preferences, whereas newspaper's ownership does not have a strong effect on a given newspaper's political orientation.[49] The study finds variation in customer preferences to account roughly one-fifth of the variation measured in newspaper slant. Conversely, the study finds much less evidence of newspaper owners, incumbent politicians or tastes of reporters as important drivers of slant.[50] This implies that there is an economic incentive for newspapers to tailor their slant to the ideological predispositions of consumers as suggested by Compaine.

A significant weakness of the study is, however, that it does not explicitly take into account that consumer ideology may be a result of a newspaper slant. Gentzkow and Shapiro simply "*expect* that most of the variation in consumer ideology is related to consumer characteristics such as geography, race and religiosity that are not affected by newspapers".[51] Given the complexity of human nature and the multitude of forces that affect human psyche, this expectation does seem more plausible than treating consumer preferences as a causal result of a newspaper's political orientation. However, it is not an argument that is completely bullet-proof, taking into account the power that the media arguably has in changing public opinion.

Moreover, as Gentzkow and Shapiro conclude, "finding that ownership is not an important driver of content diversity does not imply that the market produces the *optimal* level of

[47] Baker, 2007
[48] Baker (2007)
[49] In short, by using zip code-level data on newspaper circulation in the United States, Gentzkow and Shapiro show that right-wing newspapers circulate relatively more in zip codes with higher proportion of Republicans, whereas left-wing newspapers do better in Democratic areas (Gentzkow & Shapiro, 2010).
[50] Getzkow & Shapiro, 2010
[51] Gentzkow & Shapiro, 2010:50

diversity".[52] In this context, it is worth to highlight the often referred *monopolistic nature of local media markets*, which is also noted by Gentzkow and Shapiro.[53] For instance, the structure of newspaper markets often means that only one newspaper will survive – and the remaining paper can choose the content orientation the editor prefers.[54] As noted by Maurice Stucke and Allen Grunes, media products are often purchased on the basis that it is the only one of the general type offered, such as the only local newspaper.[55] Moreover, a few people read more than one newspaper.[56] Taking these market specifics into account, the newspaper that the individual reads has a monopoly over that reader even if the newspapers market is fragmented, and therefore it has more power to decide on the content and orientation of the newspaper disregarding readers' preferences. [57] In this instance, at least newspaper markets seem to differ drastically from the perfect markets as described in the chapter above. Next, it worth briefly explaining how media bias is created.

5. The possibility of self-censorship: media bias

The importance of pluralistic media for European democracy was also recognized by the EU High Level Group on Media Freedom and Pluralism (HLG). In its 2013 report, HLG identified a number of challenges to media pluralism, commercial pressure being one of them.[58] HLG also noted how the democratic function of media may also be undermined by poor quality journalism and a lack of journalistic integrity. It is therefore just as important for media to strive to be objective, truthful, unbiased and high-quality, as it is for them to enjoy maximum freedom from undue outside pressures.[59]

In setting up objectivity as one of the defining criteria for media quality, it must be noted that media can never be fully objective. As Marshall McLuhan has famously stated, "the Medium is the Message": any channel of information transmission inevitably adds an element of 'noise' to the original signal.[60] With respect to the message conveyed by the media, subjective aspects are inevitable and bias often permeates different narrations of the facts. Press bias is

[52] Gentzkow & Shapiro 2010:65
[53] Gentzkow & Shapiro 2010
[54] Baker (2007)
[55] Stucke and Grunes, 2009
[56] Crémer et al., 2019
[57] Stucke and Grunes, 2009
[58] Vīķe-Freiberga et al., 2013
[59] Vīķe-Freiberga et al., 2013
[60] Marshall (1964), cited in Vīķe-Freiberga et al., 2013:11

often manifested in sins of omission or hiding an inconvenient fact deep inside the newspaper.[61] A reporter may also pass on thinly sourced information, subjecting contrary information to a higher standard, or may bend a given set of facts through emphasis or subtle choices of words.[62]

Moreover, there is a long-standing tradition, especially for the written media, to embrace a political editorial identity.[63] If done transparently and respecting the distinction between fact and fiction, this kind of slant is an acceptable and legitimate expression of the diversity of opinion – media pluralism does not imply complete neutrality or lack of opinion.[64] As a matter of fact, an editor of a newspaper has the right – if not the responsibility – to establish a clear editorial line, which, however, should be made explicit to readers.[65]

In a free market economy, the owners of the newspapers must also be free to determine the strategic direction of their companies, exploit available commercial opportunities and remain competitive and profit-making.[66] However, as recognized by the HLG, the consolidation of media ownership can create significant challenges to pluralism if the owners use their economic power to restrict journalistic freedom or interfere with journalistic processes. If all newspapers in a country are in the hands of the same owners, there is potential of a threat to the variety of opinions expressed in the public sphere. As noted by the HLG, in such a situation, only the strictest commitment to the *editorial independence* of each paper can preserve media pluralism.[67] Next, it is worth addressing why profit maximization can be detrimental to quality of media products.

6. Why profit maximization can be detrimental to quality

Newspapers – as well other media products – are also subject to their own particular business model, which is shown to effect on the quality of news provided. Firstly, news collection generally has high fixed costs. To report a story typically costs the same irrelevant whether you have one reader or a million readers. Once created, the paper (digital or printed) can be

[61] Anderson and McLaren, 2012
[62] Anderson and McLaren, 2012
[63] Vīķe-Freiberga et al., 2013
[64] Vīķe-Freiberga et al., 2013
[65] Vīķe-Freiberga et al., 2013: 13
[66] Vīķe-Freiberga et al. 2013: 13
[67] Vīķe-Freiberga et al. 2013

spread to a large number of people at very low cost. This *average cost* is thus reduced with each additional product that is sold or read.[68] The high first copy, low subsequent copy cost of media products (i.e. *declining average cost curve*) results in the market not producing many valued products and companies aiming to reach as many people as possible in order to minimise average costs.[69] Moreover, a media company's economic success depends partly (sometimes entirely) on its performance on the advertisement market, which again is significantly driven by the number of recipients reached.[70]

This aim of trying to reach as many people as possible can, however, lead to a decrease in minority programs and high-quality programs, as some people cannot draw utility from high quality products due to a lack of particularly good education.[71] Indeed, there is some empirical evidence that large public companies have the tendency to sacrifice journalistic quality in pursuit of profits. In an in-depth, 5-year study of US local television news, the Project for Excellence in Journalism found that 'smaller station groups overall tended to produce higher quality newscasts than stations owned by larger companies by a significant margin'. Although the study supports the arguments for synergy benefits, in particular cross-ownership, the data "strongly suggest" that "heavy concentration of ownership in local television by a few large corporations will erode the quality of news Americans receive".[72] In this instance, it is also worth noting that high-quality, investigative journalism, recognised as particularly valuable for our democracy is expensive and time-costly, and therefore does not necessarily translate in the balance sheet.[73]

To sum up the discussion, unless newspaper owners adhere to editorial independence, the concentration of media ownership can potentially threaten media plurality. Moreover, due to their very particular economic logic of newspapers and monopolistic nature of newspaper markets, market mechanisms alone cannot establish optimal levels plurality and quality as would be optimal to support the functioning of our democracy. Next, it worth discussing briefly the current economic state of media markets, as it is also relevant in determining optimal media policies.

[68] Stucke and Grunes, 2009
[69] Stucke and Grunes, 2009
[70] Wellbrock, 2015. This also helps us to understand the rise of free services: if a firm derives its income from advertising, it has the incentive to provide its services for free (Crémer et al. 2019:20).
[71] Stucke and Grunes, 2009
[72] Project Excellence in Journalism, 2003
[73] Stucke and Gryne,s 2009

7. The Financial and Economic State of Media Markets

In addition to the differences in views on whether the markets can produce optimal results of media pluralism to serve consumer welfare, the differing views on how competition policy should be applied in the media markets are also a result of the differing views on the current state of media markets. More particularly, whether concentration in the media markets exists in the first place depends greatly on the question of what constitutes a *relevant market*.[74] These differing views are worth presenting in short.

Firstly, Graig Pouncey and Victoria Roberts, partners at *Herbert Smith Freehills* and advisors of several newspaper mergers, argue that the technological transformation of media has radically changed the way how news is produced and consumed. Whereas newspapers were earlier the primary source of news and opinion in the United Kingdom, the internet is dominating today's media landscape, online news consumption experiencing exponential growth.[75] Although newspaper groups have sought to react to these changes by growing online readership by developing their digital content, the rise of the internet has come at the cost of traditional printed newspapers.[76] The challenge for newspapers, especially the local and regional ones, has been to achieve step-by-step growth in advertisers required to make up for losses in print revenue. Hence, consolidation of newspaper groups may offer the only way to support the survival of newspapers, and thus ultimately play a very crucial role in safeguarding vivid public debate as a part of our democratic society.[77] Following this, Pouncey and Roberts call for a relaxion of the current *public interest test*[78] operated in newspaper mergers aimed at safeguarding media pluralism in the United Kingdom.[79]

[74] The European Commission defines relevant product market to comprise 'all the products and/or services which are regarded as interchangeable or substitutable by the consumer by reason of the products' characteristics, their prices and their intended use". (Commission notice on the definition of relevant market for the purposes of Community competition law, para 7). In this way, the definition of relevant markets defines the boundaries for competition.
[75] Pouncey and Roberts, 2019
[76] Pouncey and Roberts, 2019
[77] Pouncey and Roberts, 2019
[78] Under Section 58 of the Enterprise Act, the Secretary of State can intervene in mergers which raise to certain specified public interest concerns: particularly, issues of national security, media quality and plurality and financial stability. In these cases the Secratory of State can make an assessment purely on public interest considerations without conducting the 'sybstantial lessening of competition' test. (Seeley, 2017: 3)
[79] Pouncey and Roberts, 2019

While this argument has some merits, there is strong evidence that the future for the daily newspaper industry is not as bleak as Pouncey and Roberts suggest. As several authors suggest, the growth of the internet has not lessened the importance of newspapers to our democracy. The argument is three-fold.

Newspapers and investigative journalism

Firstly, having stated the special place of high quality investigative reporting to our democracy, it is worth noting much of today's high-quality investigative journalism continues to be done in local and national newspapers. For instance, a July 2011 US Federal Communications Commission (FCC) study noted that

> 'Because of the size of their staffs, the mobility of their reporters, and the many column inches they dedicate to news, they devote more time and resources to labor-and-time-intensive projects, sustain ongoing beat reporting and offer more in-depth explanation and analysis of complex issues.'[80]

Second, as stated by Thomas J. Horton, newspapers also nurture and support the current diverse and growing media ecosystem by publishing quality reporting.[81] According to estimations by journalism professors Damian Radcliffe and Christopher Ali, between 45 percent and 85 percent 'of all original reporting is done by [a] newspaper and then picked up by other media.[82] In particular, Internet sites unaffiliated with traditional media typically collect stories from various newspapers or comment on the news, but do not invest in original news coverage or investigative journalism. Hence, regardless the increasing prominence of the Internet as a place where people access news and advertisers, the Internet is more of a distribution medium rather than a source of original news content.[83] The Commission has also taken this into account by differentiating written press from other media products.[84] Furthermore, the Commission's market research in *NewsCorp/BSkyB* also confirmed that the following three segments within the national print newspaper market (i) popular tabloids; (ii) mid-market tiles; and (iii) the quality segment.[85]

[80] FCC, 2011: 242 cited in Horton 2019, 157-158)
[81] Horton, 2019
[82] Radcliffe and Ali, 2017: 66-67 cited in Horton, 2019: 158
[83] Stucke and Grunes, 2009
[84] Case IV/M.423 - *Newspaper Publishing* [1994], para 11; Case IV/M.1401, *Recoletos/Unedisa* [1999], para 17.
[85] Case COMP/M.5932 News Corp/ BSkyB [2010]) para 214.

Thirdly, instead of surrendering to the rise of the Internet, newspaper outlets are accommodating to the digital reality by publishing with synergistic Internet sites. These sites appeal to readers as a source for one-stop information: they save readers the transaction costs of finding, sifting through and assessing the quality of a huge number of Internet sites.[86]

Statistics from the Finnish newspaper media market also suggest that the state of traditional print media is not as bleak as Pouncey and Roberts suggest. Even though the circulation of print newspapers has declined, the growth of subscriptions of digital material has resulted in a slight net growth of overall volume.[87] Finland has traditionally been a newspaper-orientated country in advertising: in 2017 almost half of the Finnish audience regards newspapers as the most preferable source of advertisements.[88] Even though there are differences between different age groups, newspapers bet the social media even within the youngest.[89] However, it seems clear that the big international technology companies, such as Google and Facebook, has significantly changed the marketing landscape: according to data collected by *Kantar*, Internet advertising grew by nine (9) per cent from 2018 to 2019 and according to data collected by IAB Finland, nearly 60 per cent of Finland's Internet advertising in 2019 went to international technology giants, Google and Facebook.[90] Given the importance of advertising revenues to newspapers, this arguably casts a shadow on the survival of newspapers and hence media pluralism. However, the argument that media mergers provide the only way for newspapers to survive is worth questioning.

Calling for a relaxation of the public interest test as way to preserve media pluralism makes more sense in the UK context, where the Enterprise Act 2002 allows for the Secretary of State to intervene in mergers where they give rise to specified public interest concerns, media plurality being one of them.[91] However, on a EU-level, the argument that discouraging newspaper mergers would actually threaten media pluralism by denying newspaper outlets their only possibility to survive falters on the grounds that EU merger control allows a *failing firm defence*: if the parties of the transaction are able to show that merger is the only viable option to prevent a failing firm exiting the market, the merger is not considered to deteriorate

[86] Horton, 2019
[87] Medialiitto, 2018
[88] Medialiitto, 2018
[89] Medialiitto, 2018
[90] Official Statistics of Finland, 2020
[91] Drexl, 2015

competition.[92] The underlying logic is that 'the deterioration of the competitive structure that follows the merger cannot be said to be caused by the merger'.[93] At least theoretically, the same logic could be applied in public interest considerations too: if the deterioration of media pluralism is not caused by the merger, the merger should be permitted. Next, it is worth investigating the legal framework of the EU and pluralism in more detail.

PART 2: THE LEGAL FRAMEWORK

8. The European Union and Media Pluralism

After examining the market considerations for media markets, it is time to turn into the first actual research question: what are the legal boundaries of using competition law as a tool to protect media plurality? To answer this question, this thesis will make use of the existing literature on the specific relationship between EU competition law and media pluralism, which is relatively limited, but not non-existent.[94] In particular, this part of the thesis will use the insights by Konstantina Bania in her award-winning doctoral thesis[95] on EU competition law and media plurality and findings of the High Level Group on Media Pluralism and Freedom (HLG).[96]

According to Bania, the current tools in EU law would allow the EU competition law to go a long way in safeguarding media pluralism without the need to stretch the limits of the Treaty on the European Union (TEU) nor the Treaty on the Functioning of the European Union (TFEU), although she admits that the relationship between EU law and media pluralism has been a 'thorny one'.[97] As Bania notes, 'the extent to which the EU may intervene in order to protect media pluralism is a labyrinthine, multi-layered competence matter that involves several types of action that may be taken under different branches of EU law'.[98] Bania's

[92] Merger guidelines, para 91
[93] Merger guidelines, para 91
[94] Ibánes Colomo 2006, Harcourt 2007, Bania, 2015. However, the Commission and the CJEU has considered this relationship in a variety of decisions.
[95] In 2016, Bania won the Concurrences Thesis award, which is an Europe-wide competition selecting the most innovative phD dissertation in the field of law and economics (Bania on Concurrences, available at https://www.concurrences.com/en/authors/konstantina-bania).
[96] Referred to as Vīķe-Freiberga et al. 2013
[97] Bania, 2015
[98] Bania, 2015: 18

arguments are worth elaborating in more detail next, the EU primary law and core values providing a natural starting point.

9. The Relationship Between Core EU values and Media Pluralism

Before analysing how EU competition law treats media pluralism, it is worth examining the relationship between media pluralism and the core EU values upon which the EU is founded. This is important because the Court of Justice of the European Union (CJEU) has repeatedly favoured a *teleological interpretation*[99] when interpreting EU norms, suggesting that EU competition law should be implemented in the light of the overall objectives of the Union.[100]

The core values of the EU are embedded in Article 2 TEU, according to which "[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities". Moreover, the Article 3 TEU posits that the EU shall "combat social exclusion and discrimination, and shall promote social justice and protection …[and] economic, social, and territorial cohesion".

Media Plurality and Democracy

Given the important role media plays as a part of a functioning democracy, the concerns over media freedom and plurality are at the core of these values upon which the EU is based, including inviolable and inalienable human rights, freedom, democracy, equality and the rule of law.[101]

The democratic legitimacy of the European Union is accomplished in different ways, but a core component is representative democracy at the EU level, as required by Article 10 of the

[99] Defined shortly, teleological interpretation means that a clause is interpreted in the light of its objectives. One well-known example of practical or teleological reasoning in EU law is the *Van Gend en Loos* case (Case 26-62 van Gend en Loos (1963) ECR) (Raitio, 2012)

[100] Van Rompuy, B., 2012 referring to ECJ, joined cases 56 and 58/64 - *Consten SA and Grundig-Verkaufs GmbH; Case 32/65 - Italian Republic;* Joined Cases 41 and 44/70 - *NV International Fruit Company and others*, paragraphs 86-89; Case 6/72 - *Europemballage Corporation and Continental Can Company Inc*, paragraphs 23-24; Case 229/83 - *Leclerc/Au blé vert*, paragraph 8, and Case 26/76 - *Metro-SB Großmärkte GmbH & Co. KG v. Commission*, paragraph 20

[101] Vīķe-Freiberga et al. 2013: 14

TFEU.[102] This right is realised primarily by the right granted to all European citizens to participate in the European parliamentary elections. However, this fundamental right would arguably be hampered in a Member State where media freedom or media pluralism are under a threat, as this would deprive citizens of their right to form informed opinions.[103] In addition to being free and independent, it is important for the media to be pluralistic and inclusive for it to reflect the diversity of a country's population, taking into account the needs of minorities and people in different geographic areas.[104] In particular, high quality investigative journalism has an important watch-dog function, even though it cannot naturally replace the need for criminal investigations and the due process of law.[105] Accordingly, the Commission consistently recognized media pluralism to be crucial for the democratic processes in the Member States and in the European Union as a whole.[106]

While the elections to the European parliament take place at the national level, it is obvious that they must conform to common EU values and democratic principles. Thus, the flaws in the in the electoral process at the national level – including restrictions on media pluralism and freedom – are bound to threaten the EU democratic process itself. To ensure permanent accountability of the European institutions, a free, open and pluralist political space must be ensured as a part of the permanent process of accountability inherent in democratic representation.[107]

Media Plurality and Human Rights

The importance of media pluralism is embedded in EU Human Rights codifications too. Firstly, the Article 11(2) of the Charter of Fundamental Rights ('CFR' or 'the Charter') of the European Union directly states that "The freedom and pluralism of the media shall be respected". In case law, the CJEU has also held that media pluralism "is connected with freedom of expression, as protected by Article 10 of the European Convention on Human Rights and Fundamental Freedoms, which is one of the fundamental principles guaranteed by the [EU] legal order".[108]

[102] Vīķe-Freiberga et al. 2013: 20
[103] Vīķe-Freiberga et al. 2013
[104] Vīķe-Freiberga et al. 2013
[105] Vīķe-Freiberga et al. 2013
[106] EC press release 2007, IP/07/52 ; EC policy 16 March 2021
[107] Vīķe-Freiberga et al. 2013
[108] Case C-353/89, *Commission of the European Communities v. Kingdom of the Netherlands* (1991), para 30.

However, it must be noted that the Court's endorsement of the human rights principle is meant to ensure that the *EU institutions* would not develop policies that would force the Member States to disapply constitutional rights or international human rights and to bind the Member States only when they applied EU law.[109] This division of competences has remained in force after the amendments introduced by the Lisbon Treaty: regardless of the fact that the Charter of Fundamental Rights is now legally binding, it also explicitly provides that it does not grant new powers or tasks for the Union in the field of human rights.[110] Therefore, even the Article 11(2) of the Charter establishes the obligation for the EU to 'respect' media pluralism, seen from the human rights principle, the Member States are still primarily responsible for the protection of media plurality in their own jurisdictions.[111]

On the other hand, Bania notes that the EU does have competence to act in support of media pluralism – at least in extreme situations.[112] Article 7 TEU equips the EU institutions to ensure that all Member States respect the Union's founding principles, namely human rights, liberty, democracy, equality and the rule of law. More particularly, Article 7 establishes a procedure in which the Council can suspend a Member State's EU voting rights if it seriously acts against the core EU values embedded in Article 2 TEU.[113]

Given the pronounced importance of media pluralism to "the democratic processes in the Member States and in the European Union as a whole"[114], Bania argues that on the basis of Article 7, the EU would be able to act against a member state that engages in a conduct harmful to media pluralism.[115] It must be noted, however, that Article 7 can only be used in extreme circumstances. The extremely high threshold for its application, its political nature and special procedure make it contentious and extremely burdensome to apply.[116] Ideally, Article 7 should mostly act as a deterrent for the Member States not to engage in violations of fundamental rights, and a 'last resource' instrument when the Member States no longer comply with the EU basic values.[117] However, taking into account the recent political

[109] Besson 2011, cited in Bania 2015
[110] Bania 2015: 16 – 17, referring to Article 6(1) TEU and Article 51(1) CFR.
[111] Bania 2015: 17
[112] Bania 2015: 17
[113] Cited in Bania 2015: 17
[114] EC press release 2007, IP/07/52; EC policy 16 March 2021
[115] Bania 2015: 17
[116] Vīķe-Freiberga et al. 2013: 18
[117] Vīķe-Freiberga et al. 2013: 18

developments in some European countries – namely Hungary and Poland[118] – it is worth questioning whether the Article has the muscle to do that.

Media Plurality and Social Cohesion

In addition, media has a key role in a democracy as a tool to enhance social cohesion by ensuring that various linguistic, cultural and ethnic minorities of a given society are fairly and diversely represented.[119] Pursuant to Articles 167(1) and 6(c) TFEU, the EU has competence to support, coordinate or supplement action taken at the national level to contribute to the flowering of cultures of the Member States. However, the Article 167(5) TFEU only allows the EU to adopt incentive measures and recommendations instead of instruments that would harmonise national media laws. Consequently, media policies have traditionally been a part of the Member States' *national* cultural policies.[120]

The rationale in the EU's subordinate role is that the Member States are thought to be better-suited to develop the relevant legal tools in line with their traditions, needs and specificities of domestic markets (*principle of subsidiarity*).[121] As the national governments have not relinquished media/cultural policy to the European level, the EC has been unable to guarantee minimum standards for the protection of the public interest as this would to violate cultural policy (*principle of conferral*).[122]

Single Market and Media Pluralism

[118] The political situation in Poland and Hungary have been strongly critisised by the CJEU, European parliament and the Commission. The European parliament has stated that there is a clear danger that both countries are acting contrary to the values embedded in Article 2 TEU. (Raitio and Tuominen, 2020:18)
[119] Lefever, Wauters, & Valcke, 2013: 7
[120] Bania 2015
[121] Bania 2015; The principle of subsidiary is embedded in the Article 5 TEU. The underlying purpose of this principle is to provide a practical basis in allocating the competences between the Union and the Member States (Tillotson and Foster 2003). The Article 5(3) entails that in areas where the Union does not have exclusive competence to make policies, the Union can act only if and in so far as the objectives of the proposed action cannot be adequately achieved by the Member States, but can be better achieved at the Union level by reason of scale of effects of the proposed action.
[122] Bania 2015; The principle of conferral is embedded in the Article 5 TEU and is strongly linked to the principle of subsidiary. According to Article 5(2), the Union can only act in the limits of the competences conferred upon it by the Member States.

Since its early days, the goal of creating an internal market and establishing an economic and monetary union has been at the heart of the integration project. The two basic means in Article 2 of the Treaty of Rome for achieving the economic, social and political objectives were the establishment of a common market and the progressive approximation of the economic policies of the Member States.[123] As embodied in the Article 3 TFEU, the Union has the *exclusive competence*[124] to establish competition rules necessary for the functioning of the internal market and in the area of customs union.

However, as Bania notes, the project of achieving the desired level of economic integration often entails the adoption of measures that may also affect non-economic values. The Treaty acknowledges this too. Taking into account the tension that may arise from the fact that media services are "as much cultural services as they are economic services"[125], Article 167(4) TFEU establishes the duty for the EU institutions to "take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and diversity of its cultures".[126] Interpreted in a wide manner, this can be considered to mean that the EU also has to take media pluralism into account when applying other provisions of the Treaties, including competition rules.[127]

However, as Bania notes, the different set of competences that the EU has in protecting media pluralism has created substantial uncertainty over how far the EU can go to protect this value, as it is difficult – if not impossible – to isolate economic considerations from the social, cultural and political functions that the media is expected to perform.[128]

As noted by Bania, the studies on the relationship between the completion of the single market and media pluralism have traditionally examined the issue from two different perspectives. First, the studies discuss the desirability and legitimacy of adopting an instrument harmonising national policies on media ownership that is based on one of the Treaty provisions on the proper functioning of the internal market, and second, the effectiveness of

[123] Tillotson and Foster, 2003: 38
[124] In the areas of exclusive competence, the Union has the monopoly legislate and make legally binding acts, unless the Member States are empowered to legislate in this area by the Union or when the Member States are implementing Union acts (Borchardt 2010: 63, referring to Article 2(1) TFEU).
[125] Audiovisual Media Services Directive, Recital (5), cited in Bania 2015:18)
[126] Article 167(4) TFEU
[127] Bania, 2015: 18
[128] Bania, 2015: 18

existing instruments that principally seek to facilitate the free movement of media services but also contain provisions that aim at protecting media pluralism.[129] These insights of these studies are worth a brief overview.

Studies considering an instrument specifically aimed at addressing ownership concentration

In this context, it is important to establish that following the principle of specific conferment of powers embodied in Article 2 TFEU, the EU or its institutions do not have the power to decide on their competences. In other words, the Treaties do not confer on the Union any general power to take all measures necessary to achieve the objectives of the Treaty; instead, the extent of the powers to act are laid down in each chapter of the Treaties.[130]

In this instance, the Treaties do not equip the EU with a strong legal basis to enact an instrument that is solely aimed at safeguarding the role of the media as maintaining a well-informed citizenry.[131] It is worth highlighting that in contrast to environmental protection or any other area where the EU shares competence with the Member States, in media sector the EU may solely take action to *suppo*rt national initiatives.[132] As noted by Allison Harcourt, the Commission's DG Culture 'is not in a position to regulate the media industry due to the lack of Treaty basis.[133] Harcourt also points to the weak terms in which Article 167 is drafted. Even though there *is* the possibility that Article 167 may provide a basis for a future Court ruling[134], the Court has refrained from this and based on its past decisions, is unlikely to do so in the future.[135] As estimated by Harcourt, the Court is highly unlikely to back media concentration legislation without an explicit Treaty statement from the EU Member States.[136] Therefore, as concluded by Bania, from a legal standpoint it seems impossible that the EU institutions could base an instrument on media ownership on Article 167 TFEU alone.[137] When considering the feasibility to enact a pan-European rules on media concentration, it is worth noting that the

[129] Bania (2015)
[130] Borchardt (2010), referring to Article 2(6) TFEU
[131] Bania, 2015
[132] Bania, 2015, referring to Article 6 TFEU, which establishes one policy area where the Union has the competence to 'support, coordinate or supplement the actions of the Member States.
[133] Harcourt refers to her analysis of the Court's past decisions in which the Court has strongly rules 'in favour of market integration to the neglect of public interest regulation' (Harcourt 2005: 36).
[134] The Court ruling would provide 'a legitimate basis for legislation, meaning that a revision to the EU treaties would not be necessary' (Harcourt 2005: 71)
[135] Harcourt, 2005
[136] Harcourt, 2005: 72
[137] Bania, 2015

Member States rejected the Commission's draft proposals for a 'Media Pluralism' Directive in the late 1999[138], and it is questionable whether this will change any time soon.

The effectiveness of current tools in EU cultural policy in safeguarding media pluralism

As reviewed by Bania, another set of studies on the relationship of cultural policies and the completion of the Single Market focuses on the effectiveness of existing Directives that aim to facilitate the free movement of media services but also contain provisions that seek to ensure that the single media market is not realised at the expense of media pluralism.[139] While these provisions are clear attempts to comply with Article 167(4) TFEU, there has been a lot of skepticism on whether they are effective at this.[140] The 'European works quota' rule laid down in the Audiovisual Media Services Directive has traditionally been regarded as the main EU-level mechanism aimed at protecting pluralism.[141] Article 16(1) of the Directive provides that the "Member States shall ensure, where practicable and by appropriate means, that broadcasters reserve for European works a majority proportion of their transmission time excluding the time allotted to news, sports events, games, advertising, teletext services and teleshopping".[142] In turn, Article 17 provides that "Member States shall ensure, where practicable and by appropriate means, that broadcasters reserve at least 10 % of their programming budget, for European works created by producers who are independent broadcasters".[143] The Directive therefore aims to protect pluralism by ensuring that citizens will have the access to content provided by firms that are not owned or controlled by the broadcasters bound by the rule and that broadcasters established in the EU are not limited to the transmission of generic format programming produced by non-European, especially US, media conglomerates. [144] However, as noted by Bania, the Directive has several pitfalls.

Firstly, for the purposes of the Directive, it is sufficient that the work originates in a Member State to be defined as 'European' and no other conditions, such as originality or quality

[138] Harcourt, 2005
[139] Bania, 2015
[140] Bania, 2015: 29
[141] Burri-Nenova, 2007
[142] Cited in Bania, 2015
[143] Cited in Bania, 2015
[144] Bania, 2015

requirements, need to be fulfilled.[145] As noted by Mira Burri-Nenova, this is arguably inadequate to address the challenges facing diversity in the current broadcasting landscape, such as growing homogenisation of content and the steady decline in quality TV.[146] The Directive is a *minimum directive*, which allows the Member States to adopt a more detailed definition of the term 'European Works'.[147] However, the vast majority of the Member States have used the definition laid down in the Directive without establishing more strict criteria.[148] Harrison and Woods have also criticized the Directive's exclusion of news programming from the quota mechanism. Harrison and Woods suspect that the rationale behind the exclusion is to address industrial policy concerns - to ensure that an x amount of broadcast time is devoted to entertainment consent created with 'European Money', rather a genuine effort to provide European citizens with more diverse programming, especially factual programming.[149] In this instance, economic considerations seem to outweigh public interest considerations too.

10. Competition Law and Media Pluralism

As stated earlier, the EU has the exclusive competence to establish competition rules that apply to undertakings that operate within the EU. Competition has also been recognised as a key policy area of the European Commission, and the Commission exercises a lot of power in this area; under competition policy, the Commission has direct authority to make decisions which do not require approval by the Council of Ministers or the European Parliament but are only subject to review by the Court of Justice.[150] More particularly, the Directorate-General for Competition (DG Comp) has the responsibility for competition decisions.[151] Hence, the decisional practice and policies of the Commission are of utmost importance when discussing the relationship between EU competition law and media plurality. Next, this paper will discuss Commission's past decisions, and then move to examining its current practices.

[145] Bania, 2015, referring to Article 1(1) of the Audiovisual Media Services Directive
[146] Burri-Nenova, 2007: 1707
[147] Bania 2015: 30-31; the concept of 'minimum directive' is derived from the term *minimum harmonization.* As defined in a summary of EU legislation on EU directives (01.06.01.00) 'In case of minimum harmonization, a directive sets minimum standards, often in recognition of the fact that the legal systems in some EU countries have already set higher standards. In this case, EU countries have the right to set higher standards than those set in the directive.'
[148] Graham, 2009: 77, cited in Bania 2015: 31
[149] Harrison and Woods, 2007: 247, cited in Bania 2015: 31
[150] Harcourt 2005
[151] Harcourt, 2005

Commission's decisional practice in the past

By analyzing competition decisions between 1989 and 1999, Harcourt notes that in addition to economic considerations, DG Comp has, especially under the direction of Karel Van Miert (1993–1999), also taken into account public interest considerations in its media decisions, including concerns over media pluralism. [152]

As Harcourt notes, in the period of 1989–1999 the Commission made over 50 formal decisions in mergers the media sector.[153] While the Commission cleared a great majority of these mergers, 8 of these mergers were prohibited. This is significant given that between 1990 and 1999 the Commission only prohibited 11 of a total of 1104 merger decisions (in all sectors).[154] During his term in the 1990s, Van Miert expressed his concern for the concentration of national media markets.[155] Interviews reveal that his cabinet often had a disagreement with DG Comp over media merger decisions, the Commissioner taking a stricter line on market concentration than services.[156] In the public declaration of the *Endemol* case Van Miert even declared that 'that the strict application of the competition rules can also contribute to maintaining plurality in this sensitive sector.'[157]

However, as noted by Harcourt, due to competence limitations, the Commission had to use competition policy to tackle public policy considerations in an indirect manner by defining relevant markets narrowly. As noted by Harcourt, since its 1990 *Communication on audiovisual policy*[158] the Commission has defined media markets in an increasingly narrow manner, which has been received both negatively and positively by academic lawyers.[159] As Harcourt convincingly argues, this can be interpreted as "a means by which recommendations and decisions, made for pluralist reasons, are justified by economic rationales".[160] As discussed earlier, the Commission cannot directly make competition policy rulings by

[152] Harcourt 2005
[153] Harcourt, 2005
[154] Harcourt, 2005
[155] Harcourt, 2005
[156] Harcourt, 2005
[157] Case IV/M.553 *RTL/Veronica/Endemol*, cited in Harcourt (2005: 58).
[158] DG Comp produced 'Communication to the Council and European Parliament (EP) on audiovisual policy, in which it devotes a paragraph (§2.2.3) to 'Pluralism and Mergers'. The Communication recognizes, *inter alia*, the fact that the Television Without Frontiers directive (TWF) possible allows for a circumvention of national media rules and hence the Commission should balance this by taking an active role in protecting pluralism (cited in Harcourt, 2005:45– 46)
[159] Froehlinger (1993); Kon (1996); Ungerer (1996); Lang (1997), cited in Harcourt 2005
[160] Harcourt (2005: 46)

referring to concerns over media plurality, as the EU has no jurisdiction in cultural policy. This type of indirect use of competition policy, in which the Commission uses its merger powers for other policy ends has been noted by other academics as well.[161]

As noted by Harcourt, in the 1990s the Commission made the four negative decisions on joint ventures in the German market that can be labelled as "highly controversial".[162] For instance, in *MSG Media Service*, the Commission prohibited a German joint venture for pay-TV service called Media Service GmbH (MSG) between four German media companies. DG Comp ruled the joint venture to be incompatible with the common market as it would have created a dominant position in the three following markets: 1) technical and administrative services for pay-TV 2) cable distribution and 3) pay-TV. In addition, the DG Comp estimated the proposed joint venture to create a lasting dominant position in the future new media markets, particularly for digital television, where it could market entrance to newcomers. [163] As pointed by Harcourt, "[e]ven though these were economic rationales for preventing the joint venture, it is plain to see that such a joint venture could have presented serious implications for cultural (and political) pluralism in Germany". [164]

EBU/Eurovision represents another notable case. In the decision the Commission ruled that the agreement entitling the members of the European Broadcasting Union (EBU) to participate in a system of joint acquisition of television rights justified an exemption under Article 103(3) TFEU on the basis that it enabled EBU members "to show more, and higher quality, sports programmes – both widely popular sports and minority sports – than they would be able to do without the advantages of Eurovision".[165] As noted by Harcourt, by this ruling, DG Comp clearly recognises the role of public service broadcasters (PSMs) in securing the public interest. DG Comp approved the Eurovision System again in 2000, thus exempting Eurovision from competition rules until 2005.[166]

Kirch/Richemont/Telepiù from 1994 represents one example of a case in which the Commission used a narrow market definition in merger review. In its decision, the

[161] Cini and McGoven (1999), cited in Harcourt (2005)
[162] Case IV/M.469 - *MSG Media Service* (1994), Case IV/M.1027 - *Deutsche Telekom/BetaResearch* (1998), Case No IV/M.993 - *Bertelsmann/Kirch/Premiere* (1998), cited in Harcourt (2005).
[163] Harcourt (2005)
[164] Harcourt, 2005: 46
[165] Case IV/32.150 - *EBU/Eurovision System* paragraph 68
[166] Harcourt, 2005

Commission ruled pay-TV to constitute a separate market from the free-to-air television, and this was confirmed same year in the *Bertelsmann/News International/Vox* case.[167]

Under the direction of van Miert, the Commission also highlighted the importance of media pluralism in its public documents. For instance, in 1999 the Commission stated in its Competition Policy newsletter that:

> "2.2.3 Media plurality. While the competition rules are of general application, they must take into account of each sector's special characteristics. In the case of television, there are many characteristics which will be discussed in the annex on market definition. However, one quite specific point should be stressed here, namely the dangers inherent in the creation or strengthening of dominant positions for media plurality. *The goal of media plurality must, therefore, always be kept in mind*."[168]

In a similar vein, as Stucke and Grunes show, antitrust review of the marketplace of ideas is consistent with the US legislative history and case law. In 1944, in *United States v. Associated Press*, a majority of judges declared that Associated Press (AP) was sufficiently large to shock the marketplace of ideas, as it was 'a vast, intricately reticulated, organization, the largest of its kind, gathering news from all over the world, the chief single source of news to the American press, universally agreed to be the prime consequence'[169]. Moreover, as Justice Frankfurter declared in his concurring opinion:

> "A free press is indispensable to the workings of our democratic society. The business of the press, and therefore the business of the Associated Press, is the promotion of truth regarding public matters by furnishing the basis for an understanding of them. Truth and understanding are not wares like peanuts or potatoes. And so, the incidence of restraints upon the promotion of truth through denial of access to the basis for understanding calls into play considerations very different from comparable restraints in cooperative enterprise having merely a commercial aspect."[170]

49 years later in *Turner*, the Court concluded in a similar manner that "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes the values central to the First Amendment" and recognised that antitrust laws can be applied to the marketplace of ideas. [171]

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[167] Case *Bertelsmann / News International / Vox,* cited in Harcourt, 2005.
[168] EC Competition Policy Newsletter, 1999: 6, emphasis added
[169] *Associated Press*, 326 U.S at 373, cited in Stucke and Grunes, 2001: 262–263
[170] *Associated Press*, 326 U.S at 17, cited in Stucke and Grunes, 2001: 263
[171] *Turner*, cited in Stucke and Grunes, 2001: 266

The modernisatisation of Competition Law and the move to the 'more economic approach'

Since van Miert left the office in 1999, DG Competition has made no prohibitions in the media sector, despite the number of media mergers and joint ventures has been on the rise.[172] As Bania summarises it, over the past twenty years, the EU Competition law has moved from boldly stating that competition law can be used to prevent "a degree of cumulative control or participation in media which might endanger the existence of a wide spectrum of views and opinions in the media markets"[173] to "openly rejecting a conception of competition law that is concerned with pluralism considerations."[174]

Gerber refers to this evolvement as a 'process of modernisation of EU competition law', which started almost twenty years ago when the law and economics analysis of the 'Chicago School' was generally accepted in competition policy worldwide.[175] The modernization process includes two components. Firstly, the competition policy objectives were narrowed down: the Chicago School identifies the improvement of allocative efficiency with impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare as the main task of antitrust. This was also defined as the guiding principle of EU competition policy.[176] Secondly, formal economic methodology was chosen as the central organizing structure for applying competition law. Taken together, these two components are generally referred to as the 'more economic approach'.[177]

Accordingly, there seems to be a scholarly consensus that the Commission's approach to media markets today is market-oriented, which appears in the reliance on instruments designed to guarantee the economic functioning of the Single Market. As Bania notes, 'in

[172] Harcourt 2007: 57; Confirmed on 2 April 2021 by using the Commission's case search with the following search parameters: the Economic Sector (NACE Code) J - Information and Communication, J.58 – Publishing activities and J.59 – Motion picture, video and television programme production, sound recording and music publishing activities and J.60 – Programming and broadcasting services; decision type Council Regulation 4064/89 – Art. 8(3) and Council Regulation 139/2004 - Art. 8(3)
[173] Communication from the Commission on the future of European audiovisual regulatory policy, 2003: 8, cited in Bania, 2015: 96
[174] Bania, 2015: 96, referring to Case COMP/M. 5932 *NewsCorp/BSkyB*, paras 306-309
[175] Bania 2015
[176] Gerber, 2008, cited in Bania, 2015: 112: for a further discussion of the different 'waves' in competition policy, see Stucke (2012).
[177] Gerber (2008: 113)

recent years, the Commission has taken the stance that in cases where preventing market foreclosure is not sufficient to remedy concerns over media pluralism, it lacks the competence to examine these concerns further'.[178] This is illustrated in the decision *News Corp/BSkyB* in which the Commission declares that the media plurality review has a "different scope and focuses on issues going beyond a competition assessment"[179] and *Fox/Sky* where the Commission considers the "purpose, legal frameworks, and focus of a competition review" to be different from the media plurality review.[180]

Following Commission's decisional practice, the FCCA decided to leave questions of quality and variety simply aside in the recent *Sanoma Oyj/Alma Media* decision. In the decision, the FCCA employed the traditional (Small but Significant Non-transitory Increase in Price) (SSNIP) test to measure interchangeability between the different regional newspapers. The FCCA conducted a poll, in which the customer was asked to estimate what would he or she do in a situation if a) the price of the newspaper would rise 20 % b) the newspaper was no longer on the market.[181] The results strongly indicated that the customers were irrespective to increase in price, and would stick to their preferred newspaper.[182]

According to the Commission's merger guidelines, the higher the degree of substitutability between the merging firms' products, the more likely it is that merging firms will raise prices significantly.[183] Following this logic, the FCCA concluded that different regional newspapers are not substitutes to one another, and as regional newspapers do not compete with each other, the newspaper outlets will not have an incentive to increase the prices post-merger. Based on this, the FCCA concluded that the transaction is unlikely to significantly impede competition in the newspaper market.[184] It is worth asking, however, whether the fact that customers would not react to a small increase in price simply means that the proposed concentration will not cause any competition concerns: it can also be seen as reaffirming the fact raised by many competition law scholars, namely that the policy of preventing power over price within media products is largely *irrelevant* to customers.[185] The FCCA noted that although the internal

[178] Bania (2015: 117-118)
[179] Case COMP/M.5932 *NewsCorp/BSkyB* [2010] at para 308
[180] Case COMP/M.8354 - *Fox/ Sky* [2017]) at para 473
[181] Dnro KKV/34/14.00.10/2020 *Sanoma Oyj/ Alma Media,* para 56
[182] Dnro KKV/34/14.00.10/2020 *Sanoma Oyj/ Alma Media,* paras 57-61
[183] Merger guidelines, para 28
[184] Dnro KKV/34/14.00.10/2020 *Sanoma Oyj/ Alma Media,* para 61
[185] See for instance Stucke and Grunes 2009; Bania 2015

documents of Sanoma Oyj supported the claim that the local nature and editorial independence of the smaller, regional newspapers will be preserved, it cannot estimate the consequences for media plurality based on its competence limitations.[186]

However, while noting that the Commission has been keen to distance itself from values which, in its view, are irreconcilable with the value of undistorted competition, Bania also makes an argument the Commission has the potential to make decisions that better safeguard media pluralism without stretching the legal boundaries. These arguments are worth elaborating in more detail.

The combability of Competition Law and Pluralist Considerations

First, as Bania notes, competition law cannot be solely concerned with efficiency and welfare considerations. From the teleological perspective, competition has never been considered in the Treaties as an objective in its own right.[187] Instead, competition has been embedded in primary EU law as one of the key instruments towards the objective of EU integration in general and the completion of the single market in particular.[188] This remains the case in the post-Lisbon Era.[189] As noted earlier, the CJEU has also repeatedly preferred this teleological interpretation, positing that Articles 101 and 102 TFEU should be implemented in the light of the overall objectives of the Union.[190]

Moreover, the TFEU includes several 'cross-sectional' provisions that establish that several non-economic considerations have to be taken into account in the definition of other Union policies and activities, including EU competition enforcement.[191]Article 7 TFEU congeals this need for coherence by establishing a general obligation of the EU to "ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral powers".[192]

[186] Dnro KKV/34/14.00.10/2020 *Sanoma Oyj/ Alma Media* para 62.
[187] Bania 2015
[188] Jones and Suffrin, 2016
[189] Bania, 2015
[190] van Rompuy, 2012, cited in Bania, 2015
[191] Bania, 2015
[192] Cited in Bania, 2015, emphasis added.

However, as noted by Bania, the extent to which these cross-sectional clauses impact the application of EU competition rules is not clear. It is worth noting that the wording of some cross—sectional provisions is stronger than others. For instance, Article 168(1) TFEU states that when the Union applies other provisions of the Treaties, it is obliged to *ensure* a high level of human health whereas under Article 167(4) TFEU the Union is obliged to '*take cultural aspects into account*' when applying other provisions of the Treaties.[193]

However, as argued by Bania, although Article 168(1) leaves room for interpretation, the duty to take cultural aspects into account cannot be disregarded altogether when applying EU competition provisions of the Treaty; Article 167(4) requires a compromise.[194] The CJEU has traditionally supported this interpretation, holding that the EU competition policy cannot be implemented completely detached from other EU values. For instance, in *Stichting Collectieve Antennevoorziening Gouda*, the CJEU stated that cultural policy, understood as safeguarding the various components of the society, "may indeed constitute an overriding requirement relating to general interest which justifies a restriction on the freedom to provide services" and recognised that the maintenance of pluralism to be "connected with the freedom of expression, as protected by Article 10 of the European Convention on Human Rights and Fundamental Freedoms, which is one of the fundamental rights guaranteed by the Community legal order".[195]

On the other hand, as argued by Bania, in a case of conflict, competition concerns clearly outweigh concerns over media plurality. Compared to the Article 167 regulating culture, competition rules are directly applicable and in a higher position in the hierarchy of the priorities of the Union "in view of the generality of their reach, the strength of their wording, and their close link with essential objectives of the EU".[196]

As a result, Bania concludes her analysis by stating that concerns over media pluralism cannot override competition considerations in cases of conflict. Hence, amending the Merger Regulation to conduct a fully-fledged analysis of the effects of a transaction on media pluralism so that prohibiting concentrations which are posing pluralism concerns but which

[193] Bania, 2015
[194] Bania, 2015
[195] Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda and others,* at para 23.
[196] Van Rompuy (2012), referring to Cruz, J. B. (2002: 63-66).

are unlikely to distort competition seems to go beyond was is permitted under the EU Treaties.[197]

On the other hand, regarding the 101(3) TFEU exemptions which allow cooperation between undertakings if certain conditions are fulfilled[198], Monti has argued for an interpretation according to which "an agreement which contributes to a community policy but is inefficient, or partitions the common market, should not be exempted […] but an agreement which results in increased efficiency *and* which contributes to other Community goals is exempted because the combination of these two benefits outweighs the restriction of competition".[199] In a similar vein, Whish and Bailey note how the Commission has refused to accept an agreement to create improvement if, in practice, its effect disproportionately distorts competition in the market in question.[200] Moreover, the Commission has stressed that the parties must base their argument that Article 101(3) applies 'on a detailed, robust and compelling analysis that relies in its assumptions and deductions on empirical data and facts': the Commission will not be persuaded "by economic theory alone".[201]

According to Monti, interpreted this way, Article 101(3) TFEU prohibits unnecessary restrictions of competition but also leaves room to take cross-sectional clauses into account, such as Article 167(4) TFEU establishing that the Union shall contribute to the flowering of cultures of the Member States.[202] However, this interpretation has been criticised on the basis to competence limitations; taking into account the Union's almost non-existent competence to regulate culture, some have argued that the only plausible interpretation of Article 167(4) TFEU is created to "respect for the national legislator's political discretion" and the

[197] Bania (2015)
[198] The article 101(1) TFEU prohibits agreements, decisions by associations of undertakings and concerted practices that restrict competition. Article 101(1). However, Article 101(3) establishes a 'legal exception' to the prohibition in Article 101(1) by establishing that the Article 101(1) may be declared inapplicable in agreements, decisions or concerted practices that satisfy the following four conditions: 1) the agreement contributes to improving the production or distribution of goods *or* promotes technical or economic progress *and* 2) it allows consumers a fair share of the resulting benefit. In addition, the agreement 3) must not impose on the undertakings concerned restrictions which are unnecessary to the attainment of these objectives *nor* 4*)* enable such undertakings the possibility of eliminating competition in substantial part of the products in question (Whish and Bailey 2012: 151).
[199] Monti (2002: 116), cited in Bania (2015)
[200] Whish and Bailey (2012: 155), referring to case *Screensport/EBU* [1991], para 71.
[201] Whish and Bailey (2012: 155), referring to case COMP/34.579 *MasterCard* [2007], para *690* and paras *694-701.*
[202] Monti, 2002: 1070

Commission's task to take cultural aspects into account should be read as a *renvoi*[203] to the laws of the Member States.[204]

However, as Bania argues, while competence limitations cannot be overlooked, there *is* room for cultural, including media, policy considerations to be taken into account when applying the EU competition rules. In earlier cases when the CJEU (Court) has been asked to rule on the combability with the internal market of measures that have aimed at safeguarding media pluralism, the Court has attempted to strike a balance.[205] For instance, in *Bond van Adverteerders v. Netherlands* in which the Netherlands government sought to protect media pluralism by setting restrictions on foreign advertising and subtitling, the Court recognised that 'in the absence of harmonisation of the national rules applicable to the broadcasting and television, each Member State has the power to regulate restrict or even totally prohibit television advertising on its territory on the grounds of the public interest, provided that it treats all services in that field identically whatever their origin or the nationality or establishment of the persons providing them'.[206] However, the Court also stressed that the restrictions have to be proportionate to their intended objective.[207] Moreover, as Bania notes, it is explained in *the Note from the Praesidium (*'the Note'*)* – used in the drafting of the Charter of Fundamental Rights of the EU – that Article 11(2) establishes the EU's negative duty to refrain from taking action that would undermine media pluralism.[208] The Note is also stresses that the Article 11(2)[209] should be interpreted in the light of CJEU's case law, particularly *Stichting Collectieve Antennevoorziening Gouda*[210] - thereby implying that a conflict between media pluralism and effective competition must be resolved by a compromise.[211]

Therefore, as Bania concludes, both teleological and literal interpretation of the Treaties may support the argument that media pluralism considerations can justify restrictions of

[203] The doctrine of renvoi is applied when a court is faced with a conflict of law and must consider the law of another state. The process entails the court to adapt the rules of a foreign jurisdiction with respect to any conflict of law that arises. (Liukkunen, 2012)
[204] Schmid (2000: 164) cited in Bania (2015)
[205] Bania (2015)
[206] Case 352/85 *Bond van Adverteerders and others [1988]*, para 38
[207] Case 352/85 *Bond van Adverteerders and others [1988],* paras 36–37 and 41.
[208] Bania, 2015
[209] Note from the Praesidium, 2000: 14, 50)
[210] Note from the Praesidium, 2000: 14
[211] Bania, 2015

competition. However, the extent to which pluralism concerns can affect the outcome of a competition decision is rather limited. Article 167(4) TFEU has no direct effect and the EU continues to have a limited competence to regulate cultural policies. Therefore, although the resolution of any conflict by compromise exists, its legal basis remains fairly thin.[212] This might also explain why the Court has refrained from using the Article 167(4) in its rulings, as discussed earlier.

However, as Bania argues, if applied correctly, the EU competition law can be used to produce results that prioritise competition aspects and are more friendly to pluralism. In other words, Bania argues that it is possible to make decisions can deliver pluralism-friendly outcomes without stretching the boundaries of the Treaties or EU competition law; in other words, concerns over media plurality are not necessarily in conflict with the economic goals of competition law. This argument is worth a more detailed elaboration next.

11. The Combability of Pluralist Concerns and Economic Goals of Competition Law

Firstly, as Bania notes, although there is potential that the goals underpinning competition and media pluralism reviews may produce different – even conflicting – outcomes, this is not necessarily always the case.[213] The argument is two-fold.

Competition law as a tool to make copyright-related markets work more efficiently

First, Joseph Drexl makes an interesting argument on how the goal of protecting media pluralism can be fully integrated in the economic goals of competition as protecting media pluralism helps the markets for the production and distribution of politically relevant information work more efficiently.[214] In order to understand this argument, a discussion of the relationship between intellectual property (IP) law and competition law is in order.

Traditionally, competition law is seen as a field of law that restricts the exclusivity of IP rights when they go too far.[215] However, Drexl presents an interesting causal link between competition law, copyright law, and the distribution of information. In order to comprehend

[212] Bania, 2015: 117
[213] Bania, 2015
[214] Drexl, 2015
[215] Drexl, 2015

this not-so-evident relationship between copyright law and competition law, we need a good understanding of the economics of competition, nature of copyright law and the distribution of politically relevant information and opinions.[216]

First, from the economic perspective, copyright law can be explained by *incentive theory*[217] and *prospect theory*[218]. Whereas the incentive theory emphasizes the creation of works, the prospect theory focuses on the commersalisation of works.[219] As Drexl highlights, for both theories it is the willingness of the consumers to pay in a given market that allows the right-holders to benefit from their investment: "only right-holders that find a market for their creative works will be able to recoup their investment".[220] This is relevant in the newspaper industry and media industry more widely; for instance, newspaper publishers would not arguably have the motivation to invest in the production of their products if competitors were free to copy their work.[221] As an exclusive right, the copyright allows the right-holder to exclude others from the use of the work under protection. However, it is worth highlighting that copyright only protects those elements of a work that fulfil *the originality requirement*[222] of copyright protection: information as such in a newspaper article does not enjoy copyright protection.[223] Copyright only protects against the copying of an article in its particular form and wording, and hence prohibits free-riding on competitors' articles – which in turn enhances the free flow of information.[224] The same holds to political opinions.[225] In this way, copyright functions as a *legal prerequisite* for free media markets and a democratic society. IP law and

[216] Drexl 2015
[217] According to the *incentive theory*, private ownership of intellectual property creates incentives for the production of intellectual goods, which is why intellectual property rights are required for markets to work. (Aplin and Davis 2013).
[218] Instead of focusing on pre-invention incentives, *prospect theory* emphasises the importance of copyright law in shaping the undertaking's future activity, namely the improvement and commercialization of newly-patented products. The theory asserts that a patentee will have adequate incentives to improve and commercialise its invention only if is the only party that can enjoy the rents of such efforts (Hovenkamp, 2016: 2).
[219] Drexl, 2015
[220] Drexl, 2015:370
[221] Drexl, 2015
[222] The originality requirement is not expressly stated in international copyright law. However, the preparatory material for the Brussels Revision Conference suggest that the requirement 'intellectual creation' is implicit in the concept of 'literature and artistic work'. Different jurisdictions use varying concepts to grasp what intellectual creation constitutes, such as 'skill and judgment' or 'personal intellectual creation' (Aplin and Davis 2017: 107).
[223] Drexl 2015; in Case C-5/08 *Infopaq International A/S* the CJEU confirmed that 'words as such do not constitute elements covered by protection' and 'it is only through the choice, sequence and combination of words that the author may express his creativity in an original manner and achieve a result which is an intellectual creation.' Case C-5/08 *Infopaq International A/S,* paras 45-46)
[224] Drexl, 2015
[225] Drexl, 2015

competition law therefore, pursue complementary goals by creating incentives for innovation and creativity through excluding free-riding and maintaining competitive pressure. [226]

Moreover, as Drexl notes, both competition law and IP law share the same economic understanding of innovation. As innovation is a process that links the initial idea with the consumer, innovation can only be achieved once new products, or products manufactured through new processes, reach the consumer. This concept of innovation is mirrored by the prospect theory as a justification of IP rights and by the consumer welfare goal of competition law. Following this, competition law is in a position to guarantee efficient markets to secure that innovations reach consumers.[227]

Therefore, the working of the various markets for the distribution of copyrighted works is essential for copyright law to achieve its objectives.[228] As a result, competition law enhances copyright law. From an economic standpoint, competition law enhances the distribution of media products as carriers of information, thus contributing to democracy by distributing relevant ideas and opinions more efficiently. [229]

Understood this way, the 'political' goal of enhancing media plurality can be fully integrated if we accept a *dynamic and evolutionary concept of competition*. This concept of competition does not neglect the economic role of competition law and policy: the key is to make the markets for the production and distribution of politically relevant information work more efficiently. In this way, the evolutionary concept of competition provides an economic rationale for favouring media plurality as a basis for free public debate on political issues in a democratic society.[230]

The different views of 'public interest' between the pluralism and competition perspectives

Secondly, although it is often argued that competition and pluralism reviews may lead to different outcomes because the 'public interest' they aim to protect is not the same, this is not

[226] Drexl, 2015
[227] Drexl, 2015
[228] Drexl, 2015
[229] Drexl, 2015
[230] Drexl, 2015

necessarily the case.[231] From the competition perspective, public interest is mostly understood as the 'satisfaction of consumer preferences'.[232] In the media context, a consumer has traditionally been regarded as "someone who measures quality in terms of quantity, maximum pleasure and price"[233], is solely concerned with serving their individual needs and preferences[234], and therefore happy with a limited amount of content that reflects her needs and preferences.[235]

In contrast, from the pluralism perspective, public interest is understood as the common good that results from informed and cohesive citizens.[236] The audience member as a citizen, therefore, has different interests to audience member as a consumer, as he or she desires the media to provide accurate and unbiased information about matters of common concern, control the politicians, cover issues relating minorities and other important social and political matters.[237] This interest is protected through the effective exercise of freedom of expression, which is traditionally considered to be beyond the scope of competition law.[238]

However, as noted by Bania, given that we are both consumers and citizens, the nature of this distinction is rather artificial.[239] The Commission has occasionally taken this into account in its past decisions by interpreting EU competition in a broader manner than the accommodation of 'consumer interests' paradigm suggests. [240] For instance, in *CECED*, the Commission decided that the consumer benefit condition set by Article 101(3) was fulfilled based on environmental benefits for society.[241] The 2006 Leniency Notice does not make a distinction between consumers and citizens either, referring to the interests of consumers and citizens in ensuring that secret cartels are detected.[242] In line with the broader definition, the Court ruled in *Konkursverket v. TeliaSonera* that the function of competition rules is "to prevent competition from being distorted to the detriment of the *public interest*, individual

[231] Bania 2015, referring to the case *News Corp/BSkyB,* para 308
[232] Ariño, 2005: 384, cited in Bania 2015: 120
[233] Helberger 2008: 5, cited in Bania 2015: 120
[234] Hasebrink 2011: 324, cited in Bania 120-121
[235] Harrison and Woods 2007: 78, cited in Bania 2015
[236] Ariño, 2005: 384, cited in Bania 2015: 121
[237] Bania, 2015: 121
[238] Bania, 2015: 121
[239] Bania 2015: 121
[240] Bania 2015: 121
[241] Case IV.F.1/36.718, *CECED* [2000], paragraph 30, cited in Bania, 2015: 121
[242] Commission Notice on Immunity from fines and reduction of fines in cartel cases [2006], paragraph 3, cited in Bania 2015, 121 – 122

undertakings and consumers, thereby ensure the well-being of the European Union".[243] As argued by Bania, these cases illustrate how both the Commission and the Court have endorsed the idea that competition law may deliver an outcome that embraces public interest more widely than traditionally conceived.[244]

The vagueness of EU Competition Law

A third point worth highlighting is that what or whom EU competition law protects is not entirely clear, as the case law and the Commission's decisional practice are vague on this matter.[245] In modern cases, the broad objective of Competition law in the EU has been to protect the *competitive process*.[246] The CJEU has consistently held that in particular Article 102 TFEU is aimed at "not only at practices which may cause damages to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure."[247] However, as concluded by Jones et al., this still leaves open what effective competition involves; meaning that the question of which possible goals of competition law the EU competition law should pursue is still debated after 60 years of its creation.[248]

However, it is worth highlighting that this vagueness of EU Competition policy goals is not necessarily a result of poor law drafting. As noted by Crémer et al., competition law has been "designed to react to ever-changing market settings, to control positions of power insufficiently disciplined by competitive forces in, and to react to them in ways that take the specificities of the different markets into account."[249] This has resulted in the creation of broad, open and general rules, which give competition law great flexibility.[250] Next, it worth examining how this is reflected in merger regulation.

The flexibility of Competition Law in Merger Control

[243] ECJ, Case C-52/09, *Konkurrensverket v. TeliaSonera Sverige AB*, paragraph 22, cited in Bania 2015, 12 –122)
[244] Bania 2015: 121
[245] Bania 2015
[246] Crémer et al. 2009
[247] Crémer et al. 2009: 40, referring to cases Case T-282/09, *Intel v. Commission* para 69; Case-209/10 *Post Danmark I*, para 20; Case C-280/08 P, *Deutsche Telecom v Commission* para 182.
[248] Jones and Suffrin, 2016
[249] Crémer et al. 2009: 52
[250] Crémer et al. 2019

Firstly, according to Commission's Merger Guidelines, merger decisions should take into account "particular facts and circumstances of each case".[251] The particular facts and circumstances in the media markets already discussed in the beginning of this paper. They include, but are not limited to, the following: there is a great amount of undertakings which offer content for free, such as free-to-air broadcasters, online search engines and news aggregators, as they derive their revenue from selling advertisement space.[252] Moreover, consumers are not 'strongly homogeneous': they have differing interests and values. In cases where the provider charges for the content – such as daily (print) newspapers - consumer interests are arguably more relevant than the price: if a reader wants to read about local events instead of national events , it is unlikely that she or he will buy the national newspaper because it is cheaper.[253] This has also been recognized by the Commission: in *News Corp/BSkyB* the Commission recognised that

> "[…] out of the factors motivating readers to purchase a particular newspaper, price is not the first factor, and only one out of several important factors influencing purchasing decisions and determining customer loyalty. *The perceived political stance of a newspaper, family heritage, social-economic factors and the type of content are more important factors*."[254]

Secondly, the Merger Guidelines provide that the goal of merger control is to prevent mergers that would be lead to situation in which one or more undertakings have the ability to "profitably increase prices, reduce output, *choice or quality of goods and services and diminish innovation*". [255] As noted by Bania, these non-price dimensions of competition – reduced output, choice and quality of goods and diminished innovation – seem to have played a major role in Commission's decisional practice in various cases: For instance, in *Intel*, the Commission concluded that without Intel's exclusionary pricing practices, customers would have had 'a wider quality of choice'. [256] The Commission has also regarded quality as a feature of product differentiation in when establishing the boundaries of the relevant product markets: in *Universal/EMI*, the Commission established recorded music as a separate market from music in a digital format because of their different sound quality.[257]

[251] Merger Guidelines, para 5
[252] Bania 2015: 127
[253] Bania, 2015
[254] Case Comp/M.5932 *News Corp/BSkyB,* para 231., emphasis added.
[255] Merger Guidelines, para 8, emphasis added
[256] Intel/McAfee, paragraphs 154 et seq., cited in Bania (2015).
[257] Case COMP/M.6458 *Universal Music Group/EMI Music*, paragraph 127

In modern media merger cases, the Commission has taken quality considerations into account in the definition of relevant markets. As noted earlier, in *News Corp/BSkyB* the Commission considered popular tabloids to constitute a separate segment from quality newspapers in the market of national newspapers.[258] However, the Commission has ignored the non-price dimensions of competition completely when assessing the competitive effects of media mergers[259]; for instance, the Commission has ignored the possible quality degradation or reduction in 'editorial' competition in a number of newspaper merger decisions.

As Bania posits, instead of focusing on mergers' effects on quality deterioration or diminished innovation, the Commission has showed a clear preference for price competition. For instance, in *News Corp/BSkyB* the Commission focused on whether the new merged entity would have the incentive to engage in a bundling strategy to foreclose News Corp's competitors in the newspaper market in the future, which would eventually lead to higher prices for consumers.[260]

In a similar vein, when assessing mergers in the advertising-financed television markets, the Commission has taken the stance that although the audiences' preferences are "an important indicator of the attractiveness and acceptance of the broadcasting channels", the market definition should consist of identifying the effective *alternative sources of supply for the advertisers* on the grounds because the viewers do not pay for the content broadcast.[261] Therefore, instead of focusing on how mergers could result in diminished choice for consumers regarding TV content, merger decisions in broadcasting sector have been limited to discussing the effects of the proposed concentration on *advertising prices*. [262]

The same line of reasoning has been used in book publishing sector. For instance, parties to agreements which establish that booksellers shall sell books at the price set by the publisher have sometimes argued that the agreement qualifies for an exemption under Article 101(3) TFEU because it has enabled publishers to cross-subsidise less popular titles through the profits they make on fast-selling books, which would in turn lead to a wider range on books

[258] Case Comp/M.5932 *News Corp/BSkyB* para 214
[259] Bania, 2015
[260] Case Comp/M.5932 *News Corp/BSkyB*.
[261] Case IV/M.553 *RTL/Veronica/Endemol* (HMG), paragraph 20, cited in Bania 2015: 139
[262] Bania, 2015: 215

on the market.[263] However, in the Commission rejected this argument on the basis that the price of the product is the key element in their decision to purchase the book.[264]

As noted by Bania, these cases indicate how the Commission has clearly equated *consumer welfare* with *consumer surplus*, even though it has not been established as the main goal of EU competition law.[265] Consumer welfare is a broad, normative concept whereas consumer surplus represents the difference between the buyers' reservation price and the market price. However, as argued by Drexl, although static competition matters for keeping prices low, in copyright-related markets, the economic goals of regulation cannot be limited to the production of the most efficient number of works at relatively low prices. Consumers will not be happy with the reproduction of already existing works: instead, consumers long for product variety.[266] Therefore, placing an excessive focus on prices, or ignoring the non-price dimensions of competition, arguably fails to mirror the specifics of these markets and ultimately jeopardizes the accuracy of the decisions.[267]

However, case law from other industries, Commission's early case law from media industries as well as the wording of merger guidelines clearly show that the EU competition rules are sufficiently flexible to allow for an interpretation that seeks to take non-price dimensions into account in competition analysis. As argued by Bania, if the Commission is willing to take other factors into account in the media sectors, as it has in other sectors, the outcome of competition decisions would be more accurate and more friendly to pluralism, as the analysis would manage to grasp some certain quantitative and qualitative dimensions of diversity. Therefore, the EU competition has the potential to protect the readers/viewers/users in a way which goes beyond existing predispositions and which respects the boundaries of EU competence.[268]

Moreover, even if one approves that for the sake of simplicity, considerations over media plurality should be cleared from the competitive analysis altogether, the Merger Regulation

[263] Commission decision 82/123/EEC of 25 November 1981 relating to a proceeding under Article 85 of the EEC Treaty (IV/428-VBBB/VBVB) [1982] OJ L 52/36, paragraph 50, cited in Bania, 2015
[264] Commission decision 82/123/EEC of 25 November 1981 relating to a proceeding under Article 85 of the EEC Treaty (IV/428-VBBB/VBVB) [1982] OJ L 52/36, paragraph 55, cited in Bania, 2015
[265] Bania, 2015
[266] Drexl, 2015
[267] Bania, 2015
[268] Bania, 2015

also leaves room for the Member States to create sector-specific regulation to supplement merger regulation. As noted by Drexl, the Article 20(1) and (4) of the EU Merger Regulation, allow the Member States to take into account appropriate measures to protect legitimate interests other than those taken into consideration by the regulation, plurality of media being one of them.[269] The EU competition law therefore leaves room for the Member States, for instance, to create specialist control regimes to safeguard media plurality.

Thus, although creating an EU-level industry-specific institution to oversee media mergers is not possible due to competence limitations, it is possible for the EU Member States to establish sector-specific legislation to protect media pluralism. Indeed, as recognised by HLG in 2013, 'the main responsibility for maintaining media freedom and pluralism lies within the Member States', even though the European Union has an important role to play.[270] After establishing that it is possible to take into account media-pluralism in the EU framework, it is worth having a brief overlook of the different systems.

12. Safeguarding Media Pluralism at a National Level: the Three Models

As noted earlier, the question of whether competition agencies should promote media pluralism is the most relevant in media mergers. Drexl has identified three regulatory models jurisdictions can in principle choose from:

1) media mergers are only assessed by sector-specific regulatory agencies
2) media mergers are only assessed by competition agencies or
3) media mergers are assessed in parallel by competition agencies and sector-specific regulatory bodies.[271]

Singapore provides an example from the first category: in Singapore, a sector-specific media regulator has the exclusive competence to control media mergers.[272] This system, however, seems incompatible with the EU competition law, as it risks guaranteeing that sufficient consideration will be given to protecting economic competition in the market. Instead, the third option, which establishes a dual system of control in which two agencies will usually decide according to different standards, is permitted under the EU merger regulation, as the

[269] Drexl, 2015
[270] Vīķe-Freiberga et al. 2013: 3
[271] Drexl 2015: 378
[272] Drexl 2015

Article 20 of the Merger Regulation leaves room for to take into account legitimate public policy considerations in merger review. Germany provides an example of this type of control.

In Germany, changes in shareholding structures of a television company have to be notified to the sector specific media control agency, *Kommission zur Ermittlung der Konzentration im Medienbereich* (KEK, in English *Commission on Concentration in the Media*).[273] KEK can intervene TV mergers if a merger leads to 'superior opinion power (*vorherrschende Meinungsmacht*)'.[274] In the broadcasting sector, superior opinion power is presumed if an operator reaches 30 % of the total TV audience in a given year.[275] To block a merger, it suffices that one of the two agencies – The German Competition Authority (*Bundeskartellamt)* or KEK - prohibits the merger according to its legal standards.[276] However, the dual system of control does not apply to newspaper and radio mergers. This does not mean that the German legislator deems these mergers as less significant: the German competition law pays attention to political effects of newspaper and radio mergers by setting the notification threshold significantly lower than for other mergers.[277]

Yet, as observed by Drexl, the majority of jurisdictions seem to grant the exclusive control of media mergers to general competition agencies (option 2). Some of the jurisdictions establish a duty for the competition agency to take into account the specific objectives of media regulation. For instance, section 13 of the Austrian Cartel Act 2017 provides that a media merger shall be prohibited if it is likely that such merger might affect media plurality.[278] In Ireland, section 23 of the Competition Act allows the Minister to prohibit a merger that has been cleared by the Authority on the basis that it has a negative impact on plurality of opinions and diversity.[279] In a similar fashion, in the neighboring United Kingdom, the Secretary of State for Trade and Industry can intervene in media mergers that raise concerns over media plurality without deferring to the 'substantial lessening of competition' test.[280] The Secretary of State can ask the Office of Communications (OFCOM) and, if necessary, the Competition

[273] Thomson Reuters (2021), Interstate Broadcasting Agreement (*Rundfunkstaatsvertrag*), Article 26 and 29
[274] Drexl 2015: 379, German Interstate Broadcasting Agreement Article 26(4)
[275] Drexl 2015: 379, German Interstate Broadcasting Agreement Article 26(2)
[276] Drexl, 2015
[277] Drexl, 2015
[278] Austrian Cartel Act, 2005
[279] Irish Competition Act (14) 2002
[280] Seely, 2017; Section 58 of the UK Enterprise Act 2002

and Markets Authority (CMA) to investigate any merger that could have a damaging effect on plurality, standards or diversity in order to ensure a minimum level of media plurality.[281]

13. Competition Law and Media Pluralism Considerations in Finnish Competition Law

There are also jurisdictions where media mergers are assessed by competition authorities alone and competition authorities have no formal authorisation to take pluralism considerations into account. This often result in pluralism considerations to be left completely outside of the merger review. One example of this is Finland. According to the section 25 of the Finnish Competition Act, the Market Court may intervene in the proposed merger "if the concentration may significantly impede effective competition in the Finnish markets or a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position". The legislative drafts on the current Competition Act do not show any concern to media plurality concerns or other public interest considerations either.[282] According to the legislative drafts, the goal of competition law is to safeguard healthy, functionable *economic* competition from detrimental competitive restrictions. The goal is to ensure that competitive mechanism works and undertakings can perform as efficiently as possible in the market.[283] More particularly, the goal of merger control is to prevent detrimental consolidation of the market, which would lead in higher prices and decreased consumer welfare.[284]

There are no specific media concentration or ownership restrictions or ownership restrictions in the Act on Television and Radio Operations 744/1998 nor in the newspaper industry. The broadcasting act contains specific provisions on licensing, and a public service broadcaster, Yleisradio Oy ('Yle'), exists on the side of commercial operators.[285] Taking into account the vivid ongoing debate on the need to reform the law governing Yle (in Finnish *Yle-laki*, later referred to as 'Act on Yle'), its role in the Finnish media market is worth a brief overlook.

[281] Drexl, 2015
[282] Finnish Competition Act 948/2011
[283] In Finnish: "Kilpailulain tavoitteena on terveen ja toimivan taloudellisen kilpailun turvaaminen vahingollisilta kilpailunrajoituksilta. Tavoitteena on varmistaa, että kilpailumekanismi toimii ja että elinkeinonharjoittajat voivat toimia markkinoilla mahdollisimman tehokkaasti" (HE 88/2010 vp, p. 5).
[284] The Finnish merger control test is drafted in line with the EU Merger Regulation Article 2(3), embracing the SIEC (significant impediment to effective competition) test (HE 88/2010 vp p. 41)
[285] EC Staff Working document on Media Pluralism 2007: 38

Yleisradio as safe guarder of media plurality

The purpose and duties of Yle are defined in the Chapter 3 in the Yle act. According to the section 7, the purpose of Yle is to provide comprehensive TV broadcasting and radio content to all Finnish citizens on equal terms.[286] More particularly, the section 7(1) explicitly states that the content provided by Yle must support democracy by providing versatile information, opinions, conversation and possibilities for citizens' interplay.[287]

Yle and the Controversy with the State Aid

In 2017, the Finnish Media Federation (Finnmedia) - an advocacy organization for private companies in the media and printing industries - appealed to the Commission about Yle using public funds to provide text based journalistic content online. According to Finnmedia, the free text-based content that Yle provides to its citizens gives a selective financial advantage, distorting competition in the Finnish media market, and is therefore incompatible with EU state aid regulation.[288] Interestingly, Finnmedia has gone as far as to claim that the current regulation endangers the future of Finnish media pluralism[289], which would obviously be against its founding purpose.

To discuss the EU state aid rules in detail is beyond the scope of this thesis: however, this ongoing discussion about Yle's role is crucial to take into account when discussing competition in the Finnish newspaper market or media markets in a wider context.

First, at the EU level, the Protocol (No 29) on the System of Public Broadcasting in the Member States explicitly notes how "the system of public broadcasting in the Member States is directly related to the democratic, social, and cultural needs of each society and the need to

[286] In Finnish: "Yhtiön tehtävänä on tuoda monipuolinen ja kattava julkisen palvelun televisio- ja radio-ohjelmisto siihen liittyvine oheis- ja lisäpalveluineen jokaisen saataville yhtäläisin ehdoin. Näitä ja muita julkisen palvelun sisältöpalveluja tulee tarjota yleisissä viestintäverkoissa valtakunnallisesti ja maakunnallisesti." (Act on Yle)
[287] In Finnish: "Julkisen palvelun ohjelmatoiminnan tulee erityisesti: 1) tukea kansanvaltaa ja jokaisen osallistumismahdollisuuksia tarjoamalla monipuolisia tietoja, mielipiteitä ja keskusteluja sekä vuorovaikutusmahdollisuuksia."

[288] Finnmedia 2017: 3, Appeal to the Commission by Finnmedia 2017: 4
[289] Appeal to the Commission by Finnmedia 2017: 4

preserve media pluralism".[290] Thus, the Treaties allow the Member States to "provide funding to broadcasting organisations for the fulfillment of the public service remit as conferred (…) in so far as such funding does not affect trading conditions and competition in the Union to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account".[291] According to Finnmedia, Yle using public funds to produce text-based content is not permitted under EU state aid, as Yle should focus on audiovisual content alone.[292]

In 2009 the Commission clarified the principles of the Protocol (29) in the *Communication from the Commission on the application of State aid rules to public service broadcasting* (Broadcasting Communication). In the footnote 8, the Commission defines audiovisual services as referring to "to the linear and/or non-linear distribution of audio and/or audiovisual content and of other neighbouring services such as *online text-based information services*".[293] Hence, under the Broadcasting communication, Yle providing text-based information is clearly permitted under the EU State aid rules, *unless* it significantly hampers media markets to the detriment of citizens.[294]

The discussion about public service media (PSM) hampering competition in media markets is not unique to Finland: the idea that PSM represent unfair competition to the commercial media is a common refrain in many European countries.[295] The so-called 'crowding out' argument refers to the idea that the size and strength of publicly supported broadcasters and their digital media operations will starve commercial media or discourage them from entering markets in the first place, hereby potentially hampering media plurality.[296]

While there is evidence that supports the important role PSMs have in supporting democracy[297], it is also worth noting that another set of studies indicates that media systems

[290] The Protocol (No 29) on the System of Public Broadcasting in the Member States; Protocols to the Treaties, are, like Treaties, the EU's primary legislation (Raitio and Tuominen, 2020)
[291] The Protocol No 29(3)
[292] According to Finnmedia, Yle's provision of text-based journalistic content does not constitute a "broadcasting activity" as intended in the Broadcasting Communication (2009).
[293] Broadcasting Communication (2009), note 8.
[294] Hellman, 2020
[295] Sehl, Fletcher and Picard, 2020
[296] Sehl, Fletcher and Picard, 2020
[297] For instance, many studies have found that PSMs broadcast more news and current affairs programmes at peak viewing times compared to their commercial counterparts and proportionally more "hard news" (Aalberg et al., 2013;

with vivid commercial media and well-funded, politically independent PSM offer citizens the best conditions for the citizens to be politically well informed.[298] Hence, the question of whether PSMs are able to carve out the commercial media is definitely worth addressing.

A brief examination shows, however, that there is no evidence that public service media starves out commercial media by shrinking commercial audiences. The analysis by Annika Sehl, Richard Fletcher and Robert G. Picard, in which they draw on data from the European Audiovisual Observatory (EAO) and the Reuters Institute Digital News Report (DNR) reveals no support for the crowding out argument. In fact, the study shows that EU countries with large per capita PSM revenues tend to go hand-in-hand with large commercial broadcaster revenues and large pay TV revenues even when differences in capita gross domestic product (CDP) are controlled.[299] This seems to be the case in Finland too: according to the statistics provided by DNR, commercial counterparts seem to flourish alongside Yle.[300] In the light of this evidence, the statement that that Yle using public funds to produce text-based content is against EU state aid regulation seems largely incorrect.

After establishing the current legal framework, the remaining part of this thesis will focus on analysing the current the question of whether the Competition law should be amended in a way to better safeguard media pluralism, and if so, then how.

PART III:
THE DESIRABILITY OF INCLUDING MEDIA PLURALISTM CONSIDERATIOS IN COMPETITION ANALYSIS

14. The Debate on Competition Law and Public Interest Considerations

On a general level, there seems to be a vivid debate on public policy considerations in (EU) competition law. There is no universal definition or list of public policy considerations; public

Aalberg and Curran, 2012; Aalberg et al., 2010; Curran et al., 2009; De Vreese and Boomgaarden, 2006; Esser et al., 2012 Iyengar et al., 2010, cited in Fletcher and Picard 2020).

[298] Albæk et al., 2013; for a comprehensive review of the political impact of PSM, see also Nielsen et al., 2016: 21–43, cited in Sehl, Flecher and Picard, 2020

[299] Sehl, Flecher and Picard, 2020

[300] In fact, according to the DNR market data on Finland, Finnish commercial online brands, such as *Ilta-Sanomat online*, and *Iltalehti online* have higher weekly reach than Yle News online (Andi et al., 2020: 69).

policy interests differ from one jurisdiction to another, and they are tied to the social, cultural and political context, changing over time to reflect social developments.[301]

In the context of competition law, public policy considerations can generally be understood to represent non-economic interests pursuing collective good.[302] As established earlier, Article 21(4) of the Merger Regulations allow Member States leaves room for the Member States to take into account 'legitimate' interests in merger review, media plurality being one of them. However, as discussed earlier, public policy considerations are unlikely to outweigh economic considerations in a case of conflict. In 1999, the Commission stated that "the purpose of the Article 81(3) [Current 101(3) TFEU] is "to provide a legal framework for the *economic* assessment of restrictive practices and not to allow the application of competition rules to be set aside because of political considerations".[303] As noted by Monti, with these type of statements, the Commission has suggested that non-economic values (expect the single market, which the Commission considers as a tool to achieve greater economic efficiency) should have no role in the competitive analysis.[304] Moreover, Organisation for Economic Co-operation and Development (OECD) roundtable discussion in 2016 implicated that when the laws in OECD Member countries permit merger decisions to be based on public interest considerations, this has rarely happened in practice.[305]

The question of whether competition policy goals should be refined to take into account interests outside the economic realm has recently weakened a lot of scholarly attention, not least because of the widely accepted threat of climate change: the question of whether competition goals should better be aligned with sustainability goals has been especially vivid. In September 2020, the Commissioner responsible for competition, Margaret Vestager, established in her speech that "the time has come to launch a European debate on how EU Competition policy can best support the Green Deal [an action plan by the Commission to make the EU's economy sustainable]". However, at the same time, Vestager wanted to remind that competition policy "[…] cannot be *in the lead* when it comes to making Europe green",

[301] OECD, 2016
[302] Monti (2007)
[303] EC White Paper (200) para. 5
[304] Monti, 2007
[305] OECD, 2016

referring to other more effective policies to drive the fundamental changes, such as binding targets for cutting carbon emissions.[306]

Generally speaking, when discussing the role of public policy considerations, at one of the spectrum are those that argue that interference from other policies (e.g. public policy considerations) should be eliminated completely.[307] For instance, in merger assessment, the common argument for limiting the assessment to competition-only objectives is that other public interests may be promoted through *market efficiency* and hence there is no room nor need for their specific consideration within the competition system.[308] The business community also strongly supports the assessment of mergers exclusively on competition principles: the introduction of public interest considerations has been estimated to increase complexity and unpredictability in the merger filing process, thus increasing costs for businesses. [309] This is a well-placed concern in the already complex international setting of merger filing: More than 110 countries have competition law, and almost all of these include merger control. The profusion of different systems of merger control means that any sizable transaction with an international dimension may have to be notified to 20 or even more competition authorities. [310] Therefore, it is understandable why the idea of including public interest considerations – often unique to each country – seems too burdensome for the business community.

One factor that makes public policy considerations burdensome to apply in practice is precisely the vagueness of the term, as discussed earlier. It is feared that public interest considerations leave too much discretion to the courts and lead to value-based decisions.[311] This is relevant in case of advocating media pluralism: it obvious that pluralism is difficult to define in a prescriptive sense. There are neither objective nor quantifiable criteria for determining how many different voices should be presented in the marketplace of ideas; in other words, how much pluralism is enough.[312] For instance, when discussing questions on media plurality, Pablo Ibánez Colomo argues that

[306] Vestager's Speech on the Green Deal and Competition Policy, 2020
[307] Bania, 2015
[308] OECD, 2016
[309] OECD, 2016
[310] Whish and Bailey, 2012: 812
[311] Jones, Sufrin and Dunne, 2019: 34-35
[312] Stucke and Grunes, 2009

> "Pluralism concerns might be seen as legitimate in the media sector. However, it is unclear why the sound application of competition law principles should suffer from such concerns, in particular at a time where the Commission seems to have reached a clear stance on the aims of competition policy".[313]

However, the argument that questions on media plurality should be ignored altogether because the Commission has reached a 'clear stance' on the aims of competition policy is problematic on many accounts. First, it does not give enough weight to the Commission's ambiguous decisions in competition decisions as discussed in the Part II. Secondly, as stated earlier, the current tools and concepts in competition policy are not that clear either. These arguments are worth explaining in more detail next.

15. The current tools in Competition Law

Firstly, as noted earlier, in modern cases the broad objective of competition law in the EU and the US has been to protect the competitive process. The CJEU has consistently held that in particular Article 102 TFEU is aimed at "not only at practices which may cause damages to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure".[314] However, as Maurice Stucke has noted, the definition of 'effective competitive process' has remained a large, unresolved issue. Contrary to what is often suggested, policymakers cannot define 'effective competition' by its desired effects – lower costs and prices, improved quality or services, as these desired competitive effects can also conflict. For instance, higher prices are sometimes needed for innovation. [315] Moreover, is worth noting that there are many types of efficiencies. As has been noted by the International Competition Network (ICN), "Efficiency is broad economic term that may refer to *allocative efficiency* (allocation of resources to their most efficient use), *productive efficiency* (production in the least costly way), or *dynamic efficiency* (rate of introduction of new products or improvements of products and production techniques".[316] Worth stressing here is that competition policy that focuses on maximising one type of efficiency will not necessarily maximise other efficiencies (e.g.) dynamic efficiency.[317]

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[313] Ibánes Colomo, 2006: 26
[314] Crémer et al. (2019: 40), referring to cases Case T-286/09 *Intel v. Commission* [2014], at para. 105; Case C-209/10, *Post Danmark v Konkurrencerådet*.. , at para. 20; Case C-280/08 P, *Deutsche Telekom v Commission*, at para. 182.
[315] Stucke, 2012
[316] ICN Report (2007: 12), cited in Stucke, 2012: 577
[317] Stucke, 2012

Moreover, as noted by Stucke, efficiency is difficult to measure. If maximizing efficiency was accepted as the goal of competition law, the competition authority would ideally be able to calculate accurately the net present value of each efficiency and inefficiency. For instance, when assessing mergers, competition authority would ideally be able to compare the net value of allocative efficiency that results from achieving economies of scale and scope with the losses in dynamic inefficiency (e.g. the potential disincentive to innovate post-merger). However, merger's impact on allocative, productive and dynamic efficiencies is difficult, if impossible, to calculate.[318]

While it generally accepted that assessing the competitive effects of mergers is far from simple, a guest for more clearly defined goals remain. A complicated feature of merger control that it is necessarily forward-looking, as the assessment is essentially about predicting the future effects of the merger on the market.[319] Therefore, some level of uncertainty may always have to be accepted when assessing mergers. However, it is worth highlighting that it is not acceptable for the authority to be able to proceed against merger on purely theoretical grounds: the competition authority has to produce evidence that supports a *theory of harm*.[320] In addition, the competition authority will have to consider the counterfactual: the competition authority should demonstrate that the post-merger market will work less efficiently than had been without the merger.[321] This is when the problems with measuring efficiencies arise; if the goal is to make merger review as 'scientific', clear and predictable as possible (as opposed to 'political' or 'value-laden'), it would be ideal that to make the metrics against which to judge the competitive effects of mergers as unambiguous as possible.

A matter strongly related to theory of harm is that competition policy is not concerned with maintaining the process of competition in the markets as an end in itself. Rather, maintaining competitive markets is a tool to maximise *consumer welfare*.[322] However, as Stucke rightly puts it, "Despite its pleasant democratic ring (who, after all, advocates hindering consumer

[318] Stucke, 2012
[319] Whish and Bailey, 2012
[320] As noted by Crémer et al. 2019, ''[t]he evolution of EU Competition law since the mid-1980s is characterized by an increasing effort to set out plausible link between negative effects on "competition as such" and harm to consumers, i.e. to specify a "theory of harm" (Crémer et al. 2019, referring to the Commission's enforcement priorities in applying Article 102).
[321] Whish and Bailey, 2012
[322] Whish and Bailey, 2012

welfare?), it too suffers infirmities."[323] These infirmities raise serious rule-of-law concerns, which are worth discussing next.

When considering harm to consumers, the EU competition law has consistently referred to both final consumers and consumers at the intermediate level – meaning manufacturers who use product as input or distributors of good or service. Thus, 'consumer' is a shortcut that encompass all 'users' in a broad sense.[324] However, under any of the current definitions, quantifying *consumer welfare* is impracticable, if not possible.[325] As noted earlier, the Commission has had the tendency to equate consumer welfare with consumer surplus. However, this has often led to an assessment that ignores the impact of non-price dimensions of competition, which unsuitable in many industries, media being one of them. It is also worth noting that ICN-surveyed countries have also expressed their reluctance "to be tied to a formal definition of consumer welfare as consumer surplus, especially if consumer surplus is solely concerned with price and ignores quality and other economic criteria".[326] Next, it is worth discussing in more detail why focusing in price is not enough.

Why focusing on price is not enough

The traditional Chicago School approach also recognises that products compete on both price and nonprice elements, such as content quality. In a similar manner as a profit-maximising firm has no power to raise prices without losing customers to competitors, the same lack of power applies to detrimentally changing non-price qualities, such as quality.[327] For instance, if a newspaper decides to lower its standards in the provision of news, this will eventually drive customers away.

However, the this theory puts the greatest emphasis on price by arguing that price competition often serves as a *proxy* for other dimensions of competition too. For instance, a post-merger, price-competitive market may no longer produce the optimum level of product variety. However, in a truly competitive market, firms will soon begin to extend their product lines by introducing a greater number of new products and variants to the market, if that is what

[323] Stucke 2012: 571
[324] Cremér et al. 2019
[325] Stucke, 2012
[326] OECD Glossary, note 159, at 28; cited in Stucke, 2012
[327] Baker, 2007

customers truly want. In short, in a truly competitive market setting, firms will eventually find a profit-maximising combination in response to consumer references.[328]

In this instance, it is worth noting that the theory of price competition serving as a proxy for other competition works the best in markets where conditions close to perfect competition exist, including, but not being limited to, mobile resources and product homogeneity.[329] However, as established earlier, media markets do not usually have these characteristics. Consumers' preferences differ greatly, products are largely heterogenous, which leads to each newspaper holding a monopoly position over its readers: a reader may read a certain newspaper simply because it is the only type offered. In this setting, markets do not necessarily work in the way to best serve the theory of price-proxied competition.

Moreover, although Averitt and Lande agree that price competition "will often serve as a reasonably good proxy for nonprice competition", they note that this is often inadequate in industries which require an environment of *organizational independence* – media being one of them. [330] For instance, a newspaper merger might not concentrate the market sufficiently to threaten price competition, and the market may also produce a product menu that consumers are willing to pay for. However, unless the new merged entity commits to preserving the editorial independence of the newspapers, the market would inevitably sustain a loss of editorial diversity, which cannot be recreated through the normal mechanism of nonprice competition among the surviving firms.[331] Moreover, as noted earlier, the logic of the ideal price/product balance established by the markets falters if consumers disagree about whether the changed product is an improvement to the previous one or not, which is a disagreement inherent in the media markets. Therefore, Averitt and Lande argue that media mergers should be carefully scrutinized for the loss of nonprice competition along the dimension of diversity and challenged even there seems to be no harm to price competition.[332]

As noted by Stucke and Grunes too, "[n]onprice competition happens every day and is an important aspect of economic competition. One cannot simply limit the antitrust analysis to

[328] Baker, 2007
[329] Discussed in more detail in paragraph 3
[330] Averitt and Lande, 1997
[331] Stucke and Grunes 2009
[332] Averitt and Lande, 1997

tidy industries where the price is the sole or primary facet of competition".[333] As established earlier, although there is some empirical evidence that newspapers' content orientation may follow readers' preferences, considering the often monopolistic status of newspapers, the possibility that newspapers reflect the biases and views of its writers, editors and owners cannot be ruled out. Even if the vague concept 'consumer welfare' is accepted as a main goal of competition law, consumers do not arguably benefit from competition policy that solely focuses on price; rather, it should be concerned with the net increase in consumer welfare from having many competing and diverse news sources and editorial voices.[334] Next, it worth presenting some alternatives to price-dominated competition analysis.

The idea of "consumer autonomy" as the goal of competition law

One promising step away from the price-dominated competition analysis is the concept of consumer sovereignty provided by Averett and Lande. Shortly defined, consumer sovereignty is a set of societal arrangements in which the economy responses to the *aggregate signals of consumer demand* instead of responses to preferences, say, of individual businesses or government directives.[335] In this setting consumers are 'truly sovereign' in the sense that they have the power to define their own needs and the opportunity to satisfy those needs at prices not greatly in excess of the costs borne by the providers of the relevant goods and services.[336] Consumers can exercise their sovereignty if they can choose among many different competitors in a competitive market. In contrast, even if a single monopoly company in some market would offer more product variety, the power shifts from the consumer to the company.[337] This idea of consumer sovereignty as a goal of competition law would arguably be better suited in the media markets than the traditional price-orientated analysis. As noted earlier, in the media market context, the consolidation of media outlets might eventually lead to a situation where the prevailing media outlet has a significant amount of power to choose the editorial voice and political orientation of the newspaper. As Averitt and Lande also note, "[i]n certain sectors of the economy- for example, high-tech or *media-related* industries – *diversity of options* may be far more important to consumers than price competition".[338]

[333] Stucke and Grunes, 2001: 281
[334] Stucke and Grunes, 2009
[335] Averitt and Lande, 1997
[336] Averitt and Lande, 1997
[337] Averitt and Lande, 1997
[338] Averitt and Lande 1997: 715, emphasis added.

The Concept of 'Marketplace of Ideas' and Editorial Competition

By building on the Averitt and Lande's idea of customer sovereignty, Stucke and Grunes argue that the antitrust analysis of media mergers should be expanded to include its impact *on the marketplace of ideas:* 'a sphere in which intangible values compete over acceptance'.[339] The term is often traced to Justice Holmes, widely-cited American legal scholar, who wrote that the best test for truth is the success of an idea in gaining acceptance in free competition with other ideas.[340] Therefore, the marketplace of ideas is important to our democracy, as democracy prospers where there is an unrestrained flow of information.[341]

As noted by Stucke, US courts have also routinely considered the marketplace of ideas in the context of restraints and mergers involving local daily newspapers. More particularly, the courts has identified editorial competition as a form of economic competition. As stated earlier, newspaper derive their revenue from the sale of advertising space and the sale of newspapers themselves. However, the commercial success of a newspaper depends on the success of news and editorial operations. The more attractive the newspaper is to its targeted audience, the more readers it gains. The bigger the circulation, the better is the newspaper's ability to attract advertisers. As the antitrust laws generally comprises 'commercial competition in the marketing of goods and services' they have been interpreted to include editorial competition.[342] The concept 'editorial competition' should be included in the European and Finnish merger review too.

Competition law enforcers have started to recognize the importance of editorial competition and marketplace of ideas in New Zealand too, a small country with traditionally highly deregulated media framework.[343] When New Zealand's two largest print and online media networks, *Fairfax NZ Lt*d. (Fairfax) and *Wilson & Horton Ltd.* (trading as NZME) proposed a merger, the Commerce Commission (CC) placed substantial weight on unqualified detriments – particularly media plurality. If the merger was to proceed, *Fairfax* and *NZME* would have held direct control of nearly 90% of all daily newspapers in New Zealand,

[339] Stucke and Grunes 2001: 251
[340] Stucke and Grunes 2001: 251
[341] Stucke and Grunes 2001: 251
[342] Stucke and Grunes 2001: 272
[343] Media ownership is almost completely deregulated, and controlled only by generic (orthodox) competition law (Kingsbury 2017)

resulting in a highly concentrated media environment.[344] Even though the CC estimated that the net financial benefit of the merger is of positive value[345], the CC estimated that the cost-savings arising from the merger would not outweigh the cost on media plurality, stating that:

> "… [W]hile we cannot quantify the detriments from a reduction in quality and plurality in monetary terms, we consider that they are fundamental to wellfunctioning New Zealand society and outweigh the quantified and unquantified benefits from the merger".[346]

Consequently, the CC decided not to grant authorization for the merger as it considered it to be contrary to the public interest, even though the CC did not consider the merger to have the effect of substantially lessening competition in the markets identified.[347] The Court of Appeal of New Zealand later dismissed the appeal against the CC's refusal to grant authorisation for the merger, upholding the jurisdiction of the CC to consider other than economic and quantified effects of the merger, in particular the material detriment arising from loss of media plurality.[348]

As Stucke and Grunes argue, the ongoing debate in the United States is not whether the marketplace of ideas should be included in the competitive analysis: the larger, and still unresolved issue is what is the appropriate standard of proof and scope of belief; in other words, how much pluralism is enough. However, in the European context, it is worth questioning whether arbitrary quantitative thresholds for sufficient level of pluralism are desirable in the first place, as they are inherently subjective and impossible to apply uniformly across the EU: the different political cultures or realities in different Member States may result in the same rule having very different consequences for the protection of the values of media freedom and media pluralism.[349] The question of concentration has to be assessed in the context of the size of the market. For instance, in smaller markets, such as Finland, it is economically impossible for the advertising sector to spend enough to sustain a large number of newspapers.[350] However, this does not imply that the Commission should refrain from taking concerns over quality or media pluralism into account in its decisions – this only means that the Commission has to be sensitive to differences between the Member States and base

[344] Submission by the Coalition for Better Broadcasting (2016), cited in Kingsbury (2017)
[345] CC's decision in *NZME/Fairfax* [2017] paras 1016-1017 and 1742
[346] CC's decision in *NZME/Fairfax* [2017], para 1743
[347] CC's decision in *NZME/Fairfax* [2017], para 1739 and 1745
[348] Decision by the NZ Court of Appeal [2018] para 138(a)
[349] Vīķe-Freiberga et al. 2013
[350] EC Staff Working document on media pluralism, 16 January 2007

its decisions on a careful case-by-case analysis. Next, this thesis will discuss the desirability of taking plurality concerns into account in competition analysis in the Finnish context and propose some concrete proposals to the current regulation.

16. Media Pluralism in the Finnish context

When asked about the consequences of the *Alma Media/ Sanoma* merger for media plurality in Finland, Communications Policy professor Hannu Nieminen estimated that at the development could lead to a situation where *Sanoma Oyj* controls the news of the Western Finland, whereas *Keskisuomalainen* would control the news of Central- and Eastern Finland. He too recognizes the danger that centralization might lead to loss in media plurality, as the voice of the owner might impact directly or indirectly in the news orientation. However, Nieminen also sees benefits of the merger for the smaller regional newspapers, as the merger allows them resources to invest in the increasingly important digital content.[351] The crucial question regarding the loss of media plurality is whether the regional- and local newspapers will retain their local editorial independence.[352] As a matter of fact, *Sanoma Oyj* did assure prior that merger, that the local character and independence of the regional newspapers will be kept, and the chief editors will stay independent.[353]

In contrast, a journalism professor, Mikko Villi, is more optimistic. Villi believes that the regional newspapers will retain their local character, as the local newspapers would eventually lose readers if they gave up their locally-orientated content or it would seem like the local independence has suffered. Moreover, according to Villi, Finnish newspapers cannot afford to offer one-sided content, deeming concerns about Finnish media freedom as "Trumpian, fake news-talk", referring to the high state of press freedom in Finland.[354]

It is worth asking, however, whether Villi's view slightly optimistic. As noted several times already, newspapers are subject to their own particular economic logic, which is why the choice of the content orientation does not necessarily reflect readers' preferences – even if the editors would have perfect knowledge of readers' preferences. This is related to the two-

[351] *Helsingin Sanomat*, 11.2.2020: "Professori: Sanoman ostos merkitsee median uusjakoa"
[352] *Helsingin Sanomat*, 11.2.2020: "Professori: Sanoman ostos merkitsee median uusjakoa"
[353] *Helsingin Sanomat* 11.2.2020: "Sanoman toimitusjohtaja: juttuja voidaan jakaa lehtien välillä, säästöjä haetaan muualta kuin toimituksista"; Decision by the FCCA, Dnro KKV/34/14.00.10/2020 *Sanoma Oyj/ Alma Media,* para *62*
[354] *YLE* 11.2.2020 "Tutkija Alman myynnistä: "Tämä on looginen jatke keskittymiskehitykselle"

dimensional character of content orientation. A regional newspaper may report about local politics with a leftist slant, or about local politics with a right-wing slant. Given the varying customer preferences, a change of orientation could lead to a gain of new and loss of old customers - or of customers equivalent value to advertisers. Thus, an equilibrium could develop with either content prevailing, leaving the choice of orientation ultimately in the hands of the editor[355], which in turn highlights the importance of adhering to editorial independence in media mergers.

However, as noted before, local political context and legal culture have to be taken into account when considering desirable competition policy in Finland. As Drexl argues, the integration of media plurality in the framework of assessing competition cases is especially important in younger and developing jurisdictions where democracy is typically less developed and much more under attack than in the developed world. The markets are also less likely to match readers' preferences in less developed markets.[356] However, it is worth asking whether we should take the state of media freedom and for granted – especially in the context of accelerating concentration of media markets. As a reference to the *Sanoma Media Oyj/ Alma Media* merger decision, the current regulatory model where there is no public body to oversee media mergers and where the FCCA considers to be incompetent to take pluralism considerations into account seems largely inadequate, especially when the European Centre for Media Pluralism and Media Freedom (CMPF) has identified several risks related to the Finnish media pluralism.

Firstly, the Media Pluralism Monitor (MPM2020) – a tool used by the CMPF to assess the risks to media pluralism in EU member states and selected candidate countries - identified Finland as one of the 'high risk' countries in the area of *Market Plurality*, referring to risks related to the legal and economic context in which the market players operate.[357] More particularly, the MPM2020 identified the risk related to commercial and owners' influence over editorial content to be medium in Finland.[358] Additionally, Finland scored a medium risk in the area of social inclusiveness[359], and the risks to local/regional communities access to

[355] Baker, 2007
[356] Drexl, 2015
[357] "Under the Market Plurality area, the MPM assesses the risks to media pluralism that arise from the legal and economic context in which market players operate: market concentration, transparency of ownership, businesses' influence over editorial content, the sustainability of media production" (Brogi et al., 2020: 9).
[358] Brogi et al., 2020: 10
[359] "The Social Inclusiveness area considers access to the media by various social and cultural groups, such as minorities, local/regional communities, people with disabilities, and women." (Brogi et al. 2020: 13)

media were considered as high.[360] Even though the small market size might partly explain the high level of media concentration in Finland, is worth noting that the risks related to market plurality were considered to be lower in many countries with somewhat similar characteristics, including neighbouring Estonia, Lithuania, Sweden and Denmark.[361]

A wise approach might be being cautious of the increased concentration of media outlets, while bearing in mind that the increased concentration may not automatically generate problems for media plurality. As long as local and regional newspapers can keep their editorial independence, they can benefit from the resources brought by the merger they need to invest in their digital content, potentially improving the quality of journalism. In the context of increased media concentration, a question of course arises on how the commitment to editorial independence can be monitored by the authorities. Next, this paper will go to summing up how competition law can respond to this challenge, and whether it should be competition authority that does the estimation in the first place.

17. Proposals for Policy: Reconsideration of Competition Policy tools and the Need for Sector-specific Regulation

As discussed earlier, many legal practitioners have expressed reservations about extending competition analysis to take into account public policy concerns. In the context of media markets, it has also been suspected that competition law enforcers may have considerable problems in applying general provisions on the protection of media plurality as a separate criterion from a clear-cut competition analysis.[362] However, as established earlier, the current tools in competition law are not as clear and easily quantifiable as one might assume. In the light of this, refusing to take into account media pluralism considerations in competitive analysis for the sake of "clarity" seems inconsistent.

Moreover, as the analysis by Bania has shown, if applied correctly, EU competition law is flexible enough to make decisions friendly to media pluralism. As noted by Crémer et al., '[EU] Competition law has been designed to react to ever-changing market settings, to determine positions of power not sufficiently disciplined by competitive forces in whichever

[360] Brogi et al., 2020: 94-95
[361] Brogi et al., 2020: 9
[362] Drexl, 2015: 374

form they may arise, and to react to them in ways that take the *specificities of the different markets into account'*.[363]

Given the specifities of media markets, the neo-classical, static analysis does not take the specificities of media markets into account sufficiently, which is why a more evolutionary concept of competition is required. This includes shifting focus from short-term price effects to the quality of works and innovation as expressed by the concept of creativity.[364] Accordingly, some commentators have proposed that the SSNIP test should be replaced or at least complemented with a 'small but significant non-transitory decrease in quality' (SSNDQ) test. Despite its implied operational difficulties[365], the SSNDQ test could at least be used as a loose conceptual guide in competition analysis.[366] Moreover, as recommended by Crémer et al. too, competition authorities could also use the insights offered by behavioral economists.[367] These insights are worth examining in more detail next.

Behavioral economist approach

As a panel of independent experts recommended for the Commission in 2019, competition law should pay more attention to insights provided by behavioral economists.[368] Broadly defined, behavioral economics is concerned with improving the explanatory and predictive power of neoclassical economics by providing it psychologically more realistic assumptions on human behavior, which are based on empirical findings obtained through a variety of methods.[369] In short, as Richard Thaler has bluntly put it, '[h]umans are dumber, nicer and weaker than Homo Economicus'.[370] What is worth emphasising here is that in studying the limitations of traditional economic theory, behavioral economists do not try to reject neoclassical economics completely. Instead, by increasing the psychological realism of its assumptions, behavioral economists hope to enhance the predictive and explanatory power of

[363] Crémer et al., 2009: 52
[364] Drexl, 2015
[365] OECD Policy Roundtables, 2013
[366] OECD Policy Roundtables, 2013
[367] Crémer et al., 2019
[368] Crémer et al. 2019
[369] De Konnick 2011
[370] Thaler 1996: 227; 'Homo Economicus' refers to neoclassical economic tenet that people are self-interested utility maximisers.

traditional economics.[371] In other words, behavioral economics provides useful insight that aims to *add* to the mainstream thinking rather than to overhaul it.

As argued by Stucke, the biggest shortcoming of competition policy has been the inadequate understanding how competition works in particular markets in different communities and time periods. Markets do not work in vacuum, but are in a constant interplay with private institutions, as well as informal social, ethical and moral norms. By relying more on behavioral economists well-documented empirical findings, competition authorities might be better equipped to understand the dynamics of particular markets. More particularly, behavioral economics could help the competition authorities to understand better the demand side of the markets in terms of how consumers *actually* behave.[372] Behavioral economics, for instance, recognises that consumers may not always switch between products, even though there are several competitors in the market ('*inertia*'). Consumers can, for instance, develop loyalty towards their trusted providers, potentially preventing them from switching to competitors even in the event of a small price increase.[373]As discussed earlier, this is evident in the newspaper market: a person might read a certain newspaper simply because it is the newspaper always read at his or hers childhood home.

Behavioral economics can also help authorities to understand the supply side of the markets too; for instance, even there is a clear business case for entry, it may not take place because of irrational beliefs among firms. Of course, the bias may point in the opposite direction, resulting in a greater likelihood of entry than a rational business conduct would suggest (*optimism bias*).[374]

In the area of mergers, the behavioral economics literature highlights that there might be other motivations for mergers that go beyond profit maximisation through expected efficiencies, synergies or increased pricing power .[375] For instance, CEOs may care about their relative pay to other CEOs, or be motivated by fear: if other firms in a particular sector appear to be merging, it may be considered important not to be left behind in the process of industry

[371] De Konnick, 2011
[372] Stucke, 2010
[373] Oxera, 2013
[374] Oxera, 2013
[375] Oxera, 2013

consolidation.[376] Even though the variety of motivations behind mergers may not affect the standard analysis of unilateral and coordinated effects in merger investigations, understanding the rationale behind the transaction can sometimes be relevant when assessing the likely impact on competition and efficiencies.[377] This is crucial especially in media mergers if the merger's potential cost on media plurality is to be weighed against the expected synergies and increased efficiencies of the merger.

The need for guidelines and sector specific regulation

As noted by Crémer et al., the current flexibility of competition law with its broad, open and general rules allows it to address the novel phenomena of the digital era and novel positions of power. However, being flexible and case-specific also has a downside. The investigation of relevant competitive forces is time-consuming for both competition authorities and competition lawyers.[378] This is especially crucial in the merger review with typically tight deadlines.

However, competition authorities could contribute to the better functioning of the economy by providing more guidance. For instance, while applying general competition law to media mergers, the Australian Competition and Consumer Commission (ACCC) provides industry-specific guidelines that apply to media. 'The Media Merger Guidelines' maps the ACCC's analytical approach to assessing mergers by presenting the key areas of focus for the ACCC when assessing mergers in the media sector, diversity of media voices being one of them.[379] Although the control and ownership of commercial television, radio broadcasting licenses and newspapers is scrutinized by the Broadcasting Services Act 1992, the guidelines recognize that "the diversity of media voices is interlinked with a number of issues the ACCC considers in its competition assessment".[380]

It is worth asking, however, whether the concern over declining media plurality should be left to the competition authorities alone: given the current framework of competition analysis, the concern that competition authorities may lack the capability and resources to take into account

[376] Whish and Bailey, 2012
[377] Oxera, 2013
[378] Crémer et al., 2009
[379] ACCC's Media Merger Guidelines
[380] ACCC's Media Merger Guidelines, para 39

all public interest concerns into account seems well-grounded. As stated by the former Commissioner responsible for competition, Van Miert:

> "My personal opinion is that I am convinced of a need for European legislation on media concentration. From a democratic point of view, it is necessary. When we said no to the Nordic satellite case, the ruling was considered to be difficult. *We cannot use competition rules to govern democratic issues*."[381]

Even if the idea of a European-level specific regulatory body to oversee media mergers seems to go what is permitted under the Treaties and is also politically unrealistic, sector-specific regulation could be introduced at the national level. Australia has shown to be a forerunner in this instance too. In late 2020, the Australian government introduced the world-first media legislation in parliament on Wednesday that will force Facebook and Google to negotiate a fair payment for news outlets when using their content on Facebook newsfeed and Google search.[382] The purpose of the law is to address the loss of advertising revenue from traditional media companies to the tech giants; in Australia, for every $100 of online advertising spent, $53 goes to Google, $28 to Facebook and $19 to anyone else. The code therefore aims to ensure that traditional media outlets are fairly remunerated for the content they create, which also helps to sustain public interest journalism in Australia.[383]

Taking into account that nearly sixty per cent of advertising revenue goes to tech giants in Finland too[384], it is worth considering whether this type of legislation should be introduced in here too. As the Union of Journalists (fin. *Journalistiliitto)* have also advocated, private media companies are clearly in a need of financial support so that media pluralism in Finland can be preserved. However, restricting the role of the PSB Yle is not the answer. What is required, instead, is a comprehensive media policy concerning media in all its forms, which Finland does not currently have.[385] As the examples of other countries, including Australia and Germany show, this policy should be implemented with clear rules and guidelines provided for businesses to secure a degree of legal certainty. Competition law could, and can be, used to support the goal of media pluralism, but it cannot be the only tool to protect media pluralism – just as competition law cannot be used as the only tool to tackle climate change or other public policy concerns either.

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[381] Van Miert in response to a question by Allison Harcourt in the Future of Merger Control in Europe Conference, cited in Harcourt, emphasis added (Harcourt 2005: 59)
[382] *The Guardian,* 9 December 2020
[383] *The Guardian* 9 December 2020
[384] Official Statistics of Finland, 2020
[385] Statement by the Finnish Union of Journalists, 2020

18. Conclusion

To sum up the discussion, this thesis has aimed to shed light on the following research questions:

1. To what extent does EU competition law take into account concerns over to media plurality and;
2. Is it desirable for the competition policy to take into account media pluralism considerations in the first place?

This thesis has aimed to answer these two questions using a mixed-method, interdisciplinary approach; this thesis has analysed relevant codes and case law and attempted to find a prevailing consensus about desirable policy options among legal practitioners and scholars.

This has not been an easy task: firstly, the EU's capacity to protect media pluralism is a complex, labyrinthine entity coded in embodied in several branches of EU law. Even though the analysis by Bania suggests that the EU competition law – applied appropriately by taking the *specifics* of each market into account and applying competition rules in a *teleological manner* by taking into account the overall objectives of the Union – the Commission's contemporary decisional practice indicates that the Commission has been keen to distance itself from concerns related to media pluralism. More particularly, instead of focusing on non-price parameters of competition, the Commission has strongly relied on static, price-dominated analysis in its decisions regarding media markets.

This thesis has had a critical look on the current concepts and tools in competition analysis and favoured an evolutionary concept of competition. The evolutionary concept of competition recognises that the 'economic' goals of competition can be fully aligned with the goal of protecting media pluralism, once the not so-evident link between competition law and copyright law is understood. Moreover, by analysing the nature of media markets – newspaper markets in particular – this thesis has aimed to show that the traditional, static price-dominated analysis is ill-suited in media markets. The crucial point here is that price is not the dominant factor for consumers when purchasing media products: quality and product variety weigh much more. Therefore, implementing a competition policy that ignores non-price dimensions

of competition does not arguably serve the underlying purpose of competition law, which is enhancing customer welfare. In this regard, the static model of competition could be supplemented with more empirically sound insights provided by behavioral economists and paying more attention to the other dimensions on competition, including quality and innovation. The vague concept of 'consumer welfare' could also be reconceptualised with the idea of 'consumer sovereignty' as the goal of consumer law, as discussed in paragraph 15.

Related to the idea of consumer welfare as the goal of competition law, this thesis has also highlighted the important role media pluralism has in preserving a democratic society. By examining the business models of media markets and discussing how the ownership of a news outlets affect media slant, it appears that the concern that the concentration of media outlets might negatively affect media plurality seems well-placed. Due to the two-dimensional character of news content and the monopolistic status newspapers often have over its readers, editors have a great amount of freedom to choose their political orientation, and therefore we cannot expect the markets the market mechanisms to secure an ideal level of media pluralism. However, the concentration of media outlets is not automatically a threat to pluralism; if the new merged entity adhered strictly to editorial independence of the smaller newspapers, the smaller newspapers could potentially benefit from the merger. When considering the threat of a media merger to pluralism, it is extremely important that the specifics of each markets and the society in which they operate are taken into account, including the size of the market.

This thesis has also discussed the ongoing debate about competition law and public policy concerns. Firstly, those favouring the status quo, static, and purely economic analysis seem not to put enough weight to the fact that it too suffers infirmities; for instance, the concepts of 'economic efficiency' and 'consumer interest' are vague, multidimensional concepts and difficult to measure in practice. As stated above, focusing solely on *consumer surplus*, which might be more easy to measure in practice, does not arguably serve consumers especially in dynamic markets, media markets included.

However, going too much to the other spectrum, namely using competition law as a primary tool tackle *all* societal problems, ranging from tackling the climate change to protecting media pluralism does not appear as a smart approach either. In particular, taking into account the often strict deadlines for merger reviews, competition authorities and courts may simply lack the resources and capabilities to access mergers based purely on media plurality

considerations. However, this does not mean that competition law, given its flexibility, should not be used to *support* public policy considerations, as the Commission has done under the direction of Van Miert and is currently done in many countries, including New Zealand, Australia and Austria. However, that it seems more suitable to develop a comprehensive media policy, employed through clear and targeted rules and guidelines for businesses. Competition law, however, can be used to support the goal of media plurality.